Office - Supreme Court, U.S.
FILED
DEC 30 1983
ALEXANDER L. STEVAS,
CLERK

83 - 1082

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD J. ELROD, Sheriff of Cook County, et al.,
Petitioners,

vs.

DAN DURAN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD J. DALEY
State's Attorney of Cook County
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5460
Attorney for Petitioners

JANE CLARK CASEY,
Deputy State's Attorney
Chief, Civil Actions Bureau

HENRY A. HAUSER,
Assistant State's Attorney
Deputy Chief, Civil Actions Bureau
Of Counsel

The Scheffer Press, Inc.—(312) 263-6856

QUESTION PRESENTED

Whether the federal district court properly ordered the release on recognizance of pre-trial detainees from the Cook County Jail to enforce the provisions of a consent decree (1) where the local authorities charged with management of the county jail determined that limited emergency double-bunking in a newly remodeled section of the jail pending construction of new facilities was preferable to such release and was necessary to cope with a substantial increase in admissions and (2) where the proposed double-bunking would have been constitutionally permissible.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
I.	
The Decision Of The Court Of Appeals Conflicts With This Court's Approval Of Inmate Double-Bunking In *Bell* v. *Wolfish*, 441 U.S. 520 (1979), And Raises Significant, Disputed And Fundamental Questions Regarding The Proper Exercise of Federal Court Remedial Power As Applied To County Jail Management	14
II.	
The Decision Of The Court Of Appeals Conflicts With The Holding Of The Third Circuit In *Union County Jail Inmates* v. *Di Buono*, 713 F. 2d 984 (3rd Cir. 1983)	21
CONCLUSION	22
APPENDICES	
A - Opinion Of The United States Court of Appeals For the Seventh Circuit	1a
B - Memorandum Opinion And Order Of The United States District Court For the Northern District of Illinois - Eastern Division	1b

TABLE OF AUTHORITIES

CASES:

	PAGE
Bell v. *Wolfish*, 441 U.S. 520 (1979)	passim
DeFilippis v. *United States*, 567 F. 2d 341 (7th Cir. 1977)	17
Duran v. *Elrod*, 542 F. 2d 998 (7th Cir. 1976)	4
Lane v. *Sklodowski*, 97 Ill. 2d 311, 454 N.E. 2d 322 (1983)	15
Mayberry v. *Maroney*, 529 F. 2d 332 (3rd Cir. 1976)	18
People ex rel. Hemingway v. *Elrod*, 60 Ill. 2d 74, 322 N.E.2d 837 (1975)	19
Procunier v. *Martinez*, 416 U.S. 396 (1974)	21
Rhodes v. *Chapman*, 452 U.S. 337 (1981)	16
Rozner v. *Korshak*, 55 Ill. 2d 430, 303 N.E. 2d 389 (1973)	17
Schilb v. *Kuebel*, 404 U.S. 357 (1971)	19
Smith v. *Fairman*, 690 F. 2d 122 (7th Cir. 1982)	16
Union County Jail Inmates v. *DiBuono*, 713 F. 2d 984 (3rd Cir. 1983)	4, 21
Washington v. *Penwell*, 700 F. 2d 570 (9th Cir. 1983)	17

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

Article VII, Section 6(a), Illinois Constitution of 1970	17
Ill. Rev. Stat. 1981, ch. 38, par. 110-5	18
par. 1003-7-3	15
par. 1003-15-2	15
4 Ill. Reg. 190 (effective July 1, 1980)	17
Rule 60(b), Federal Rules of Civil Procedure	17

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

RICHARD J. ELROD, Sheriff of Cook County, et al.,
Petitioners,

vs.

DAN DURAN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, RICHARD J. ELROD, Sheriff of Cook County, Illinois, PHILLIP T. HARDIMAN, Executive Director of the Cook County Department of Corrections, the COOK COUNTY BOARD OF COMMISSIONERS and its members* in their official capacities, and the COOK COUNTY BOARD OF CORRECTIONS, and its

---

* The members of the Board of Commissioners of Cook County presently are George W. Dunne, President, Matthew W. Bieszcat, Charles R. Bowen, Bernard Carey, Frank W. Chesrow, Carl R. Hansen, Irene C. Hernandez, Mary M. McDonald, Daniel P. O'Brien, Jeanne P. Quinn, Matt Ropa, Richard A. Siebel, John H. Stroger, Jr., Martin Tuchow, Harold L. Tyrell, Samuel G. Vaughan, Joseph I. Woods.

members* in their official capacities respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 22, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet reported, appears herein as Appendix A. The district court's Memorandum Opinion and Order of March 22, 1983 (Release Order), which is unreported, appears herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1983. A timely Petition for Rehearing, with Suggestions for Rehearing *In Banc*, was denied on October 6, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV, § 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

* The members of the Cook County Board of Corrections presently are Arthur R. Waddy, Chairman, Dorothy G. Drish, Vice-Chairman, Thomas J. Cooney, Frederick D. Sengstacke, David R. Rivera.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

I.

INTRODUCTION

The heart of this case is whether or not the district court erred by ordering the recognizance release of pre-trial detainees from the Cook County Department of Corrections, rather than permitting limited emergency double-bunking until construction of a new pre-fab 500 bed facilitiy is completed.* The release of individuals from a pre-trial detention facility by a federal district court is a most serious matter. Because such federal action is so intrusive upon the state criminal justice system, and, thus, upon the people whom it is designed

---

* The County's plans to construct a 500 bed facility suffered a setback in the fall of 1983, when the low bidder for the project was found to be a disqualified bidder under a Cook County ordinance which prohibits, among other things, the letting of contracts to corporations which have pleaded *nolo contendere* to bid rigging charges. Nonetheless, the County (1) has purchased the design plans for the institution; (2) has completed site preparation work; (3) has obtained approval of the plans from various regulatory agencies, and other interested parties, including the plaintiffs; (4) has designated the engineering supervisor for the project; and (5) is presently negotiating to award the contract for the actual erection of the structure.

to protect, the district court should be affirmed only if no other legitimate enforcement alternative was available to get inmates off the floor of the department. County officials submit that limited emergency double-bunking should have been permitted to ease the population problem at the department because it was "a constitutionally adequate remedial scheme developed by responsible officials and [is] carried out within the context of existing state institutional structures, [and] would be far less intrusive than a remedy imposed on those officials against their own administrative judgment.", *Union County Jail Inmates* v. *Di Buono,* 713 F. 2d 984, 1002 (3rd Cir. 1983).* Review of the Seventh Circuit's ruling will afford the Court an opportunity to establish controlling precedent in the developing, troublesome area of local jail overcrowding, and to temper the conflict which now exists between the Third and Seventh Circuits on the specific issue of inmate release orders.

The facts which lead to the release order begin in 1976 when the Seventh Circuit sustained pre-trial detainees' class action complaint challenging the constitutionality of various aspects of their confinement. *Duran* v. *Elrod,* 542 F. 2d 998 (7th Cir. 1976).

Thereafter, substantial discovery ensued in the litigation, while construction of new department facilities,**

---

* The *Union County Jail* case was decided by the Third Circuit on August 11, 1983, a month after the Seventh Circuit ruled in the case at bar. *Union County Jail* was brought to the attention of the Seventh Circuit pursuant to Circuit Rule 11 while this case was pending on Petition for Rehearing which eventually was denied on October 6, 1983.

** Housing units at the Cook County Department of Corrections consist of:

the culmination of a $150 million master plan, approached completion.

The Division I Renovation

In 1977, the county officials determined that Division I, an old-style maximum security facility, should be renovated to provide needed capacity at the Department. Prior to the renovation, the Department had housed pre-trial detainees in Division I in 4′ by 8′ cells on a double-occupancy basis. Detainees had consistently challenged this arrangement as constitutionally impermissible overcrowding.

The renovation plan called for, among other things, the removal of the wall between adjacent sets of cells such that 8′ by 8′ cells were created. This resulted in a four-fold reduction in the capacity of Division I, assuming single occupancy of the renovated cells.

•• (Continued)

A. Division I — A five story structure built in 1929 with inmates housed in tiers. Prior to renovation, Division I housed two inmates per cell with a stated capacity of nearly 2400 inmates. After the renovation, Division I housed one inmate per cell with a stated capacity of 627.

B. Division II — Three buildings housing inmates and Cermak Memorial Hospital. Inmates are housed in large dormitory rooms. Division II's stated capacity is 1109.

C. Divisions III, IV, V, VI — Modern facilities which house inmates in detention rooms in wings on a double-occupancy basis. Division III houses only women inmates and has a stated capacity of 253. Division IV has a stated capacity of 704. Division V contains the reception and classification areas and has a stated capacity of 992. Division VI has a stated capacity of 992.

The Consent Decree

The consent decree of April 9, 1982 was hammered out after lengthy negotiations between the parties. The district court also had a hand in bringing the parties together, and bridging gaps in language about which the parties were in disagreement. The decree established the goals to be attained which included the avoidance of overcrowding and the provision of (1) adequate staffing, (2) adequate food supply and service, (3) adequate facilities and supplies for personal hygiene, (4) reasonable law library facilities and access thereto, (5) reasonable visiting privileges, (6) reasonable recreational facilities and access thereto, (7) appropriate classification standards, and (8) reasonable environmental health conditions.*

---

* The specific provision of the consent decree upon which detainees rely reads as follows:

> Division I shall be renovated according to the description provided in Appendix A, attached and made a part of this Order. Division I as renovated shall house one man per cell.

Consent Decree, par. 2.A.1, at 5.

When the decree was drawn the county officials insisted that the following language be included:

> Assuming the reasonably prompt implementation of any standards set forth in this Order, the totality of the conditions of confinement at the Cook County Department of Correction will continue to conform to the previously stated goals, and thus continue to protect the constitutional rights of the members of Plaintiff class. *It is not intended by this Order to indicate that such standards represent the minimum compliance with the constitutionally required goals, or that failure to have attained such standards in the past reflects a past failure to comply with constitutional requirements.* (Emphasis Supplied)

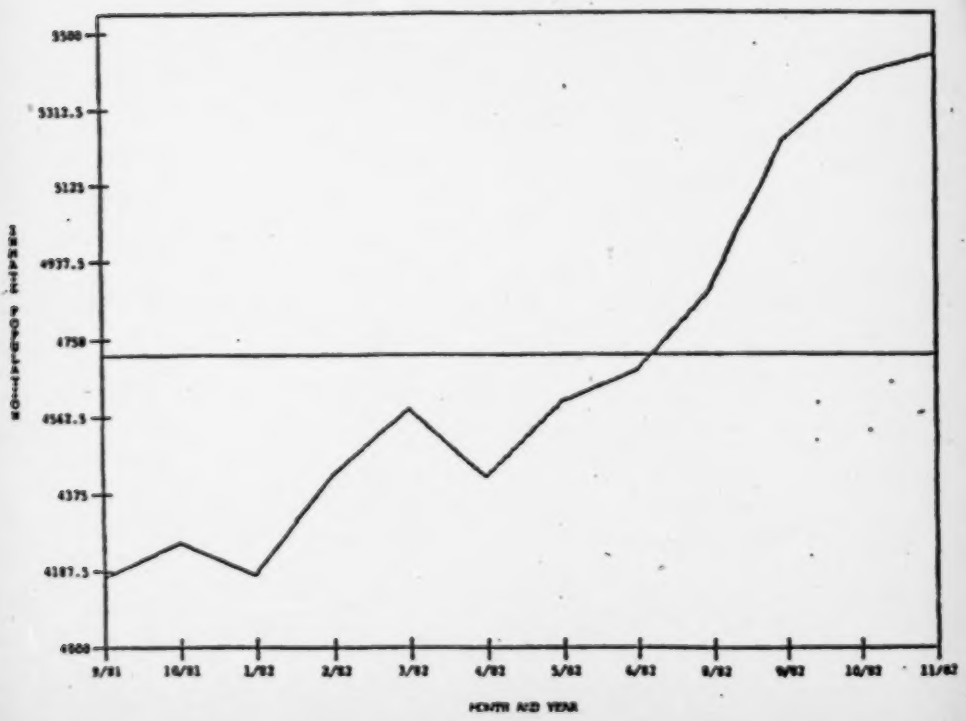
Consent Decree, at p. 4, par. h.

The Rise In Population

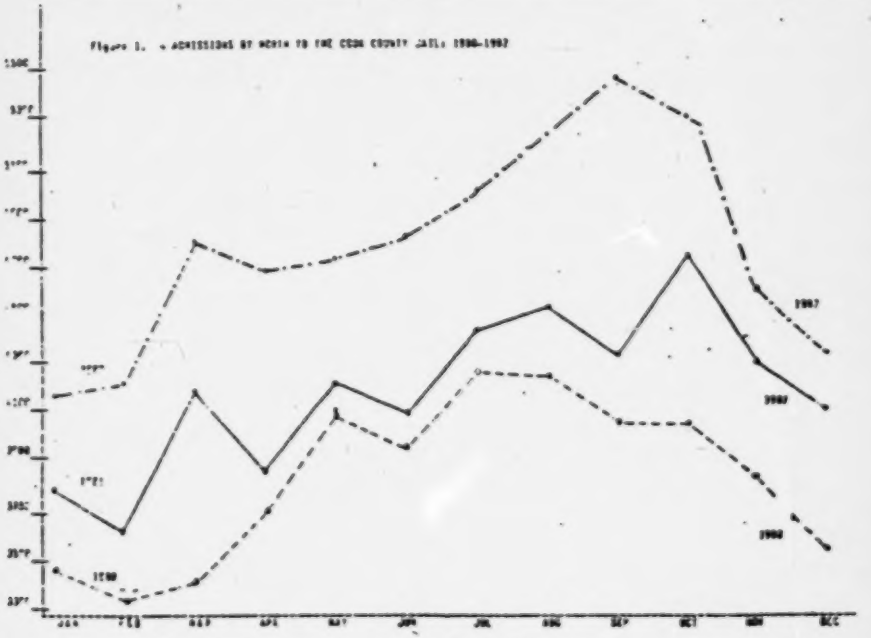
As early as May 14, 1982 the county officials met with detainees' attorneys and the court-appointed monitor for the purpose of discussing the overcrowding problem which was developing within the institution. A number of communications and conferences were had between the Department of Corrections and the County Board defendants with regard to plans and procedures for dealing with the developing situation at the Department of Corrections.

The following charts demonstrate the sharp increase in population which the department experienced in the summer of 1982. The first chart shows how the population simply shot up from an April, 1982 population of 4400 to a November, 1982 population of nearly 5400.

Figure 2. POPULATION - COOK COUNTY DEPARTMENT OF CORRECTIONS



The reason for the increase is apparent from the following graph which demonstrates the substantial increase in admissions to the department in 1982, as against 1981 and 1980.



The population increase experienced by the Department of Corrections in the summer and fall of 1982 was characterized by a National Institute of Corrections Technical Assistance Report as (1) "a rapid jump in inmate population", N.I.C. Report, at 3 and (2) "a sharp

increase in all population levels", N.I.C. Report, at 12. Indeed, the district court stated that the N.I.C. Technical Assistance Report, in which the foregoing charts appear, has "greatly assisted in evaluating the problem." Release order at 3, Appendix B at 3b.

The Rule To Show Cause

On October 21, 1982, the court-appointed monitor submitted a report which indicated that conditions at the Department of Corrections were deteriorating as a result of the overcrowding which the Department was experiencing. In that report the court-appointed monitor indicated that, "The relentless and rapid increase in the jail population in recent months has imposed hardships on the inmates, correctional staff, and the administration, and made it virtually impossible to achieve compliance with the goals outlined above." (Interim Compliance Report at 2)

On November 8, 1982, the detainees filed a petition for rule to show cause which brought to the district court's attention the matters already referred to in the report of the court-appointed monitor.

The petition for rule focused upon Divisions II and V of the Department, where the overcrowding in the institution was reflected. Neither the petition nor the affidavits in support of the petition allege that Division I was overcrowded.

The County Officials' Response to the Rule

The county officials responded to the petition for rule on December 1, 1982. Their response asserted that (1) the overcrowding was due to factors outside the control

of the department; (2) the National Institute of Corrections had been engaged to prepare a report on the system factors or attributes that were contributing to the overcrowding; (3) and that all inmates as of December 1, 1982 were issued sufficient mattresses, blankets, sheets and uniforms.

Other matters referred to in the rule were also alleged to have been dealt with as far as possible including staffing, personal hygiene, law library privileges, visiting, physical exercise, classification, environmental health, telephones, and disciplinary procedures.

The Cap Order

On January 26, 1983 the district court entered its order establishing a population limit of 4500 inmates for the Department of Corrections. The court found that "In recent months the inmate population at the Department of Corrections has consistently exceeded on a continuing basis, and continues to exceed, the actual number of beds available by several hundred persons." The court directed a reduction of Department population to 4500 by February 11, 1983 and ordered defendants to file "a report detailing (a) the methods defendants have chosen to reduce the inmate population to 4500 persons, and (b) the results achieved in reducing the population."

County Officials' Response to the Cap Order

As directed by the court, the county officials filed a status report on February 11, 1983 as to the actions taken to reduce the population at the department. These actions included the following:

(1) the county officials requested the Chicago Police Department to increase the appropriate use of recognizance bonds;

(2) the county officials requested the Presiding Judge of the First Municipal District of the Circuit Court of Cook County to communicate the importance of release on recognizance to judges of the First Municipal District;

(3) Director Hardiman of the Department of Corrections prepared lists of inmates who are non-multiple offenders on misdemeanor charges whose trials were scheduled after February 11, 1983. The State's Attorney was requested, where appropriate, and agreed to accept in misdemeanor cases decided prior to February 11, 1983 a sentence of time already served by the individual incarcerated;

(4) the Sheriff notified the State Department of Corrections that persons charged with the mere technical violation of parole were unacceptable to the Department;

(5) the Sheriff requested that Circuit Court judges not stay mittimus in criminal cases with regard to convicted defendants;

(6) the county officials requested the circuit court to send misdemeanants sentenced to a term between one year and sixty days to the State Department of Corrections rather than to the County Jail;

(7) the Sheriff and Director Hardiman reviewed the bond status of inmates and arranged them in classes of $1000, $2000, $3000, $4000, and $5000 bonds so that an emergency review program of these bonds could be made;

(8) the Sheriff obtained an estimate as to the cost of a modular jail and requested the Board of Commissioners of Cook County to authorize the construction of a 500-bed dormitory-type modular jail facility;

(9) the county officials contacted the City of Chicago Planning Department regarding obtaining property to the south of the jail complex for the construction of further long term jail facilities.

Concurrently with the status report of February 11, 1983, the county officials sought modification of the consent decree to permit limited emergency double-occupancy of cells in Division I of the Department. This motion was necessary because paragraph 2(a)(I) of the consent decree provided, in part, that "Division I, as renovated, shall house one man per cell." The motion indicated that Division I had been renovated according to a description appended to the decree to provide nineteen cells per tier each containing 64 square feet. Each cell was provided with a toilet, a steel unmovable bed, a mirror, a cabinet, and hot and cold running water. Each tier contains a day room adjacent to the cell area. On March 9, 1983 the County Officials filed further materials in support of the motion to modify the consent decree. The affidavit of Phillip T. Hardiman, the Executive Director of the Department, indicated that (1) short term double-bunking in Division I will permit individuals to be taken off the floor in Division V and to be double-bunked in 64 square foot cells in Division I, and (2) that short term emergency double-bunking in Division I will not affect the ability of that Division to provide reasonable conditions with regard to staffing, personal hygiene, visiting, physical exercise, classification, and environmental health.

The Release Order

On March 22, 1983, the district court ordered the Sheriff "to release on their own recognizance the persons

held in default of the lowest amount of bail, and among persons held on the same amount of bail the ones who have been confined for the longest time." (Order, at 5; Appendix B, at 3b-4b) The district court also confirmed the denial of defendants' motion for double-occupancy of cells in Division I.

On appeal,* the Seventh Circuit upheld the district court's refusal to permit double-bunking in Division I; and sustained the release order necessitated by denial of the motion to modify.

* A stay of the release order was entered by the Court of Appeals on April 15, 1983. The stay was vacated upon decision of the case on July 22, 1983.

REASONS FOR GRANTING THE WRIT

I.

The Decision Of The Court Of Appeals Conflicts With This Court's Approval Of Inmate Double-Bunking In *Bell* v. *Wolfish*, 441 U.S. 520 (1979), And Raises Significant, Disputed and Fundamental Questions Regarding The Proper Exercise of Federal Court Remedial Power As Applied to County Jail Management.

In its leading correction law case, *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Court stated, "Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination." *Bell* v. *Wolfish*, 441 U.S. at 562. This petition invites the Court to reaffirm its direction that "the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan." *Bell* v. *Wolfish*, 441 U.S. at 562.

The undeniable effect of the district court's order is to require the release of pre-trial detainees who are being held at the Department of Corrections pursuant to state court orders. These state court mittimus orders have established the amount of bail necessary to insure the appearance of the pre-trial detainee at his next court date. While this situation exists in any jail conditions case where a "cap" is set, it nonetheless implicates very basic issues concerning state-federal relations. The impact of the release order upon the state court system requires close analysis and scrutiny of the alternatives to the

path chosen by the district court. County officials have attempted at every stage to alleviate the overcrowding problem* which the district court concedes ". . . is not within their control, for the population input at the Department of Corrections is generated by the state criminal justice system and not by defendants." (Release Order, at 2, Appendix B at 2b). County officials offered the reasonable alternative of double-bunking inmates in Division I until a 500-bed pre-fab facility is constructed. To that end the county defendants moved the court for a modification of the consent decree provisions requiring single-bunking in Division I. That motion, together with

---

* The corrections overcrowding problem has flared nationwide, and has put extreme pressure on the capabilities of state prisons and local jails. See "Illinois Prisons threaten to Turn Away Inmates From County Jails." New York Times, July 26, 1983, page 8; Time Magazine, "Cell Motel", Vol. 122, July 11, 1983, p. 42; "Early Releases Pose Crime Dilemma" U.S.A. Today, November 9, 1983, p. 7A. In Illinois these pressures resulted in *Lane* v. *Sklodowski*, 97 Ill.2d 311, 454 N.E.2d 322 (1983) in which the Illinois Supreme Court halted the incorrect "early release" of sentenced inmates from the State's prison facilities. The Illinois legislature has responded in part by deleting the statutory guidelines as to cell size, (see Senate Bill 546, amending Ch. 38, par. 1003-7-3, Ill. Rev. Stat. 1981 by *deleting* the language "All new, remodeled and newly designated institutions shall provide at least 50 square feet of cell, room or dormitory floor space for each person."); and by limiting the regulatory control of the state Department of Corrections as to local jails (See Senate Bill 546, amending Ch. 38, par. 1003-15-2, Ill. Rev. Stat. (1981), by adding the language, "such standards shall not seek to mandate minimum floor space requirements for each inmate in county or municipal jails and houses of corrections.") See Public Act 942, approved November 23, 1983.

the county's commitment to construct a new 500 bed facility are different sides of the same coin, and should preclude the sort of release order entered by the district court.

Division I cells contain 64 square feet and Director Hardiman has stated by affidavit that constitutional conditions will be maintained if double-bunking is permitted. Moreover, the Court's cases clearly hold that double-bunking is not punishment and does not, per se, violate the due process rights of pre-trial detainees. See *Bell* v. *Wolfish*, 441 U.S. 520, 541-542 (1979) (double-bunking in 75 foot square cells did not constitute punishment or violate due process); *Rhodes* v. *Chapman*, 452 U.S. 337, 348-349 (1981) (double-bunking in cells of 63 square feet did not constitute punishment where "the double-celling . . . made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation. Nor did it increase violence among inmates or create other conditions intolerable for prison confinement." *Rhodes, supra*, at 348-349; and the Seventh Circuit has sustained double-bunking. See *Smith* v. *Fairman*, 690 F. 2d 122 (7th Cir. 1982) (double-bunking in older (Pontiac) facility in cells of 64 square feet was not punishment and not unconstitutional.) Thus, there is no constitutional imperative against the emergency double-bunking of detainees in Division I until the crisis has passed with the construction of the new 500 bed facility.

Certain provisions of state law,* and the consent decree itself do not purports to establish constitutional minima to be placed on the Department of Corrections. The consent decree entered below constituted a commitment by these defendants to the court as to goals set forth in the decree. Entry by government agencies into such decrees is not without risk or uncertainty, especially in jail conditions suits, where those entering into the decree do not have effective control of the elements within the system which create the problem. Nonetheless there are two factors which induce governmental defendants to enter into such decrees. First, a consent decree is written by the parties, and they therefore have control of the definition, articulation, and resolution of the dispute. Secondly, consent decrees, like any other judgments, are subject to modification under Rule 60(b) where there are legal or factual changes which render the decree inequitable.**

---

* Detainees have argued that Illinois state jail standards, which provide "all existing cells and detention rooms shall be designated for single occupancy." 4 Ill. Reg at 206, Sec. 8-2 (effective July 1, 1980), operate to limit double-bunking. However, the standards do not apply to Cook County, which is a home-rule unit. See Ill. Const. 1970 Article VII, Sec. 6(a) and *Rozner* v. *Korshak*, 55 Ill. 2d 430, 435, 303 N.E. 2d 389, 391-392 (1973). Furthermore, in *Bell* v. *Wolfish*, 441 U.S. 520 (1979) the Court noted regarding minimum standards that ". . . while recommendations of these various groups may be instructive in certain cases, they simply do not establish constitutional minima; rather, they establish goals recommended by the organization in question." *Bell*, 441 U.S. at 544 n. 27 (1979).

** A subsidiary issue is raised as to whether the district court properly applied rule 60(b) law in refusing to modify the consent decree. See *Washington* v. *Penwell*, 700 F. 2d 570, 574 (9th Cir. 1983); *De Filippis* v. *United States*,

The district court's refusal to permit limited emergency double-bunking, and order requiring the release on recognizance of pre-trial detainees is wrong for the following reasons:

First, the release order ignored other available and less intrusive remedies for the enforcement of the consent decree. Thus, limited emergency double-bunking was incorrectly rejected by the district court.

Secondly, the release order substitutes a truncated, federally imposed recognizance scheme in place of Illinois' bail bond system. It is the Illinois General Assembly, not the state court judges, which sets the substantive guidelines for bail in Illinois*. The Seventh Circuit's

---

** (Continued)

567 F. 2d 341, 343-346 (7th Cir. 1977); and *Mayberry* v. *Maroney*, 529 F. 2d 332, 335-336 (3rd Cir. 1976). The Seventh Circuit's surface treatment of this issue ("The County facilities were crowded at the time of the Decree and have remained so since." Slip. Op. at 9. Appendix at 9a), coupled with its circumscribed "bargain theory" of institutional consent decrees (Slip. Op. at 9, Appendix A at 10a), contributed substantially to the slighting of the important local governmental and state interests at stake in this case.

* See generally, ch. 38, par. 110-1 *et seq.* Ill. Rev. Stat. 1981. The state court judges set bail on the following basis:

Sec. 110-5. Determining the amount of bail.
(a) The amount of bail shall be:
(1) sufficient to assure compliance with the conditions set forth in the bail bond;
(2) not oppressive;
(3) commensurate with the nature of the offense charged;

statement that "The district court fashioned a remedy placing the responsibility for the jail on the appropriate parties and not in the federal court." Slip op. at 11, it Appendix A at 12a), is, therefore, wholly illusory since it ignores the reality that the Illinois judges lack authority to override legitimate policy set by the legislative branch.

Thirdly, the Seventh Circuit's conclusion that those who would benefit from the release order are not subject to serious state bail requirements is without logical support in the record. Indeed, bail setting takes into account several complicated factors bearing on orderly court proceedings and public safety and welfare. Dissatisfaction with the state court bail system hardly justifies its unprincipled revision under the guise of dealing with local jail overcrowding. Courts, which necessarily exist to resolve specific disputes, lack the necessary breadth of input and information to resolve such fundamental questions. *Bell* v. *Wolfish*, 441 U.S. at 547-548 (1979).

Fourth, both the Seventh Circuit and the district court ignore the fact that there is no relationship between the amount of bail and the likelihood of appearance at trial. As the 1980 Supplemental Report of the Illinois Judicial Conference Study Committee on Bail Procedures points out:

---

* (Continued)

(4) considerate of the past criminal acts and conduct of the defendant;
(5) considerate of the financial ability to the accused. . .

Ch. 38, par. 110-5 Ill. Rev. Stat. 1981; *See also People ex rel. Hemingway* v. *Elrod*, 60 Ill. 2d 74, 322 N.E. 2d 837 (1975); *Schilb* v. *Kuebel*, 404 U.S. 357 (1971).

> Since the purpose is to assure that the defendant will appear for trial, courts have traditionally pegged the obligated sum or financial security requirement to the seriousness of the crime charged on the assumption that the risk of flight increases with the potential punishment to be faced if convicted at trial. Totally rational, this view ignores the individual circumstances of the particular defendant, *for persons with strong community ties and good background may be far better risks to appear for later proceedings on serious accusations than the transient charged with a minor offense.* (Emphasis supplied).

Supplemental Report, at 29.

County officials submit that review of the record will clearly demonstrate that limited emergency double-bunking in Division I should have been permitted to ease the population problem at the Department, and that the Seventh Circuit's opinion affirming the district court's release order clearly misapplies the law applicable to this case. At present, extraordinary pressures are brought to bear on local officials whose duties include the maintenance of the detention facilities in various localities in Illinois.

As the Court noted in *Bell* v. *Wolfish,* 441 U.S. 520 (1979), "Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional." (citations omitted) *Bell,* at 544, n. 25; and, thus, review of this case is warranted to determine whether the district court has, indeed, made an incorrect "judgment call" in an area "confined to officials outside the Judicial Branch of Government." *Bell* v. *Wolfish,* 441 U.S. at 562.

II.

The Decision Of The Court of Appeals Conflicts With the Holding Of The Third Circuit In *Union County Jail Inmates* v. *DiBuono*, 713 F. 2d 984 (3rd Cir. 1983).

Affirming the district court's release order, the Seventh Circuit observed, "This court is under the impression that the County defendants are attempting to avoid compliance with the Consent Decree by rewriting the terms which they have difficulty meeting. It was reasonable for the district court to enter what it considered the best remedy to the overcrowding in the County jail facilities." Slip op. at 13, Appendix A at 13a While giving lip service to considerations of federalism, the court below has held effectively that the concerns of federalism and judicial restraint set out in cases like *Bell* v. *Wolfish*, 441 U.S. 540, 562 (1979) and *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974) have diminished impact where a jail conditions case has been settled by consent decree.

On the other hand, the Third Circuit in *Union County Jail Inmates* v. *DiBuono*, 713 F. 2d 984 (3rd Cir. 1983) permitted double-bunking and reversed a release order entered by the district court in precisely the same context of local jail overcrowding in the face of a consent decree which purported to preclude double-bunking. The Third Circuit stated, "We, therefore, hold that the district court, in its zeal to correct what it perceived as unconscionable conditions, improperly exercised its discretion by rejecting the Commissioner's proposed remedial scheme and by ordering the removal of state prisoners from the county facility." *Union County Jail Inmates* v. *DiBuono*, 713 F. 2d 984, 1003 (3rd Cir. 1983).

The case at bar (just as did *Union County Jail*) presents a clear fact situation favoring judicial deference to those legitimately charged with local corrections decision-making. When two Circuits reach such disparate results in similar cases, this Court's clarification of the substantive rules, and the process of decision would be most appropriate and helpful to that portion of the bench and bar confronted with these consistently troublesome corrections issues.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

RICHARD J. DALEY
State's Attorney of Cook County
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5460
Attorney for Petitioners

JANE CLARK CASEY,
Deputy State's Attorney
Chief, Civil Actions Bureau

HENRY A. HAUSER,
Assistant State's Attorney
Deputy Chief, Civil Actions Bureau
Of Counsel

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-1574

DAN DURAN, et al.,

Plaintiffs-Appellees,

v.

RICHARD ELROD, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 2949—Milton I. Shadur, *Judge.*

ARGUED JUNE 6, 1983—DECIDED JULY 22, 1983

Before WOOD and CUDAHY, *Circuit Judges,* and GRANT, *Senior District Judge.**

GRANT, *Senior District Judge.* The Plaintiffs-Appellees are a certified class consisting of all pretrial detainees in the custody of the Cook County Department of Corrections. The Defendants-Appellants are Richard J. Elrod, the Sheriff of Cook County, Phillip T. Hardiman, the Executive Director of the Cook County Department of Corrections, the Cook County Board of Commissioners and its members in their official capacities and the Cook County Board of Corrections and its members in their of-

* The Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, sitting by designation.

ficial capacities (hereinafter "County officials" or "County defendants"). The plaintiff detainees filed this class action in 1974, pursuant to 42 U.S.C. § 1983. The detainees charged the defendant County officials with violations of their rights under the Eighth and Fourteenth Amendments to the United States Constitution by failing to provide safe and humane conditions of confinement. After extensive discovery and negotiations between the parties, a comprehensive Consent Decree was entered by the district court on April 9, 1982. This Decree called for the renovation and modernization of the county jail facilities; increasing of staff personnel; improvement in food services and provision of personal hygiene supplies; increased access to the law library; more physical exercise periods and increased hours for visitation. As part of the Consent Decree, the parties agreed that the John Howard Association (hereinafter "Monitor") should be appointed by the district court to review and evaluate the implementation of the Decree at set time intervals. The district court retained jurisdiction over the case in order to enforce as necessary the Decree. This case is presently before this Court on expedited appeal from a subsequent district court order.

On October 9, 1982, the John Howard Association submitted their first six month report regarding jail conditions. The Monitor found that the goals outlined in the Consent Decree had not been achieved. The Monitor reported that, by the second week of June 1982, among inmates assigned to Division II, 375 were not assigned a bed. The report continued that by September 27, 1982 the population in Division II had reached 1,285 men with 436 sleeping on the floor, a large number without mattresses or blankets. R. 15, Ex. B, p. 4. In Division V, 370 men were sleeping on the dayroom floors, many again without mattresses or blankets. In October 1982 in the Women's Division (Division III) from 15 to 50 women were sleeping on mattresses on cell floors. The Monitor reported that one of the contributory factors to the jail population was the retention of low-bond inmates for

longer periods because of inability to raise a relatively small amount of bail. The report indicated that from 500 to 750 inmates could be released "if they had only $100." *Id.* at p. 5. As a result of the Monitor's report, the detainees filed a Petition for a Rule to Show Cause why the County defendants should not be held in contempt for violating the Consent Decree. That petition was granted.

Hearings were held, and on January 25, 1983, the district court ordered a "cap" on the population of Department of Corrections at 4500 inmates. This figure was arrived at to assure that each inmate would have a bed. The defendants were directed to file with the court by February 11, 1983 a report detailing (a) the method chosen to reduce the inmate population and (b) the results achieved in the reduction of the population. R. 19, p. 3.

On February 11, 1983, the defendant County officials filed a status report, including the Director's Log from January 21 to February 8, 1983, which indicated that on February 8, 1983 the jail population was 4,830 with 4,583 beds available. At the same time, the defendants filed a Motion for Relief from the population "cap" ordered on January 25, 1983 and a Motion for modification of the Consent Decree requesting double-bunking in Division I. At a March 2, 1983 status hearing, Judge Shadur called for the parties to submit criteria for the release of inmates in order to reach the "cap". The plaintiffs suggested on March 4, 1983 the use of the same criteria used by Judge Lasker in the New York case, *Benjamin* v. *Malcolm*, No. 75 C 3073 (S.D. N.Y. filed June 23, 1981), i.e., release on their own recognizance those persons in default of the lowest amount of bail, and among those held on an equal amount of bail, the ones who had been confined the longest. R. 27. The defendants failed to submit a criteria, contending that release of inmates was beyond their legal authority. R. 26, p. 2. On March 21, 1983, the district court's Minute entry denying the defendants' Motion to Modify the Consent Decree was docketed. The follow-

ing day, March 22, 1983, the district court entered the Opinion and Order subject of this appeal. Judge Shadur held:

> This Court therefore orders (as did Judge Lasker) [*Benjamin* v. *Malcolm, supra*] that if compliance with the Order requires a reduction in inmate population at the D of C at any time after April 15, 1983 and if no Illinois state court of competent jurisdiction has then specified a different method of selecting the persons to be released to accomplish such reduction, Sheriff Elrod and Director Hardiman are directed to release on their own recognizance the persons held in default of the lowest amount of bail, and among persons held on the same amount of bail the ones who have been confined for the longest time. This order leaves the primary and direct responsibility with the state court judiciary, where both the litigants and this Court agree it belongs.
>
> This order also confirms the denial of defendants' motion for double celling of Division I at the D of C. That would represent a step backward from the salutary provisions to which defendants agreed when they co-authored the Decree.

R. 31.

The County defendants immediately appealed from that March 22 Memorandum Opinion and Order docketed March 29, 1983. R. 32. A stay of the district court Order was granted by this Court on April 15, 1983.

Upon appeal, the following issues were raised:

1. Whether the district court incorrectly denied the County officials' Rule 60(b) Motion to modify the Consent Decree to permit double-bunking in Division I;

2. Whether the district court in its March 22, 1983 Opinion and Order exceeded its authority in directing the release of low-bond pretrial detainees.

I.

Motion to Modify Consent Decree

It must initially be noted that the detainees argue that this Court is without jurisdiction to review this issue as the Notice of Appeal failed to designate an appeal from the February 11 Order denying modification of the Decree. The Minute entry was dated February 11, 1983, the date the County officials filed their Motion to modify, but the entry was *not docketed* until March 21, 1983. The March 22, 1983 Opinion and Order stated in conclusion "[t]his order also confirms the denial of defendants' motion for double celling of Division I at the D of C."

Fed. R. App. P. 4(a)(1) provides:

> (a) Appeals in Civil cases.
>
> (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the *date of entry* of the judgment or order appealed from; . . .

(emphasis added). The date of entry has been defined as occurring:

> . . . when the essentials of a judgment or order are set forth in a written document separate from the court's opinion or memorandum and when the substance of this separate document is reflected in an appropriate notation on the docket sheet assigned to the action in the district court. This dual requirement is established by Civil Rule 58, Entry of Judgment, which states that "[e]very judgment shall be set forth on a separate document" and that "[a] judgment is effective only when so set forth and when entered as provided in Rule 79(a)." Rule 4(a), which

> is derived without change in substance from a former civil rule, incorporates both of these standards.

Caperton v. *Beatrice Pocahontas Coal Co.*, 585 F.2d 683, 688 (4th Cir. 1978) (footnotes omitted).

In this instance, the date of entry of the initial denial of the Motion to modify was March 21, 1983. This was confirmed by the Order of March 22, 1983. The notice of appeal was filed March 30, 1983.

The requirements of Fed. R. App. P. 3(c) that a notice of appeal "shall designate the judgment, order or part thereof appealed from . . ." have been given liberal interpretation by federal appellate courts. It is unmistakable that the defendants intended to appeal both the opinion ordering release of low-bond detainees to meet the "cap" and the denial of the modification requested. Both issues were addressed in the Opinion, a final appealable order. The release order became necessary when the request for modification was denied.

> The rule is now well settled that a mistake in designating the judgment, or in designating the part appealed from if only a part is designated should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake.

9 Moore's Federal Practice ¶203.18, p. 3-76-77 (1983) (footnotes omitted).

As the Supreme Court pointed out in *Foman* v. *Davis*, 317 U.S. 178, 181-2 (1962):

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of

> pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 48. The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1.

Under the facts of this case, there was no prejudice to the appellees as both parties argued the merits of the issues on appeal. *See Hennessy* v. *Schmidt*, 583 F.2d 302, 306 (7th Cir. 1978). We will consider both issues on appeal.

The County officials contend that their request for an emergency double-bunking modification of the Consent Decree was precipitated by the unforeseen and substantial increase in admissions to the jail facilities in 1982.[1] They contend that the temporary change in the Decree is necessary in order to cope with the unforeseen emergency population growth. Defendant Phillip T. Hardiman indicated in his affidavit (R. 26, Ex. D) that short-term double-bunking in Division I will permit taking individuals off the floors in Division V, and that double-bunking would not affect the reasonable conditions of the division.

---

[1] Beginning in June of 1982, the Cook County Department of Corrections began to experience population levels which were in excess of design capacity and one hundred to two hundred inmates over the average number of operable cells (bed space) available to the Department. By early fall, the number of inmates housed in the Cook County Department of Corrections on an average day had climbed to between five hundred and six hundred above its conventional operating capacity of 4,500 inmates. By October and November of 1982, the average daily population levels in the Cook County Department of Corrections were fluctuating between seven hundred and eight hundred inmates above the jail's capacity. Report of The National Institute of Corrections, p. 1-2 (January 31, 1983), R. 22, Ex. 3.

The County officials argue that they have made a good faith effort to meet the goals set in the Consent Decree. They contend their Rule 60(b) motion is clearly less intrusive to federalism than the release of individuals, confined under the state court system, on their own recognizance pursuant to the guidelines of the March 22 Order. The County officials argue that their modification proposal is especially appropriate because the County has already approved the construction of a new 500 bed modular jail facility.[2]

Rule 60(b) is an extraordinary remedy requiring "a showing of exceptional circumstances of grievous wrong evoked by the new unforeseen condition." *DeFilippis* v. *United States*, 567 F.2d 341, 342 (7th Cir. 1977). As District Judge Lasker held earlier in *Benjamin* v. *Malcolm*, 528 F. Supp. 925, 928 (S.D. N.Y. 1981), modification under Rule 60(b) requires "that a significant change of circumstance shall have occurred since the date of the final judgment to warrant its modification." Justice Cardozo held in *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1931):

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The *injunction*, whether right or wrong, *is not subject to impeachment in its application to the conditions that existed at its making.* We

[2] It should be noted that the County defendants first began to speak of a proposed new 500 bed facility in mid-February 1983 indicating a six to eight month completion date. As of June 6, 1983 when oral arguments were heard on this case not one spade of ground has been turned. Counsel, in answer to a question regarding construction, reported that approval had been obtained but a bond issue was necessary, soil samples had to be taken and final plans drawn up. In other words, the start of construction is sometime down the road.

> are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. *Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.*

(Emphasis added).

As the detainees pointed out in brief and at oral argument to this Court, the County officials have failed to show any unforeseen or unexpected condition since the entry of the Decree. The County facilities were crowded at the time of the Decree and have remained so since. *See Benjamin* v. *Malcolm,* 528 F. Supp. at 929. The Third Circuit, when considering the modification of a consent decree to allow the emergency confinement of Pennsylvania inmates for a maximum of 48 hours in a basement facility required the showing of exceptional circumstances and extreme hardship unless the relief was granted. *Mayberry* v. *Maroney,* 558 F.2d 1159, 1163, (3d Cir. 1977), *See also McGoff* v. *Rapone,* 78 F.R.D. 8, 24 (E.D. Pa. 1978). We do here also.

In the case at hand, the County officials have requested a modification of the Decree to allow double-bunking (an additional 627 beds) in Division I. Such a modification would allow approximately 250-300 inmates to be assigned beds.

This Court weighed these figures and legitimate concerns with the National Institute of Correction's projection of inmate population "in excess of 6,000 by early

1984 unless changes in policy and practices alter the current trends." R. 21, Ex. 3, p. iii. While the population of the County facilities has been slowly decreasing from the November 1983 high (the downward trend notable since the January 25, 1983 imposition of a population "cap"), the modification of the cell occupancy in Division I, the delay in the construction of the new facility and the expectation of at least normal inflation of inmate population attacks the integrity of the Consent Decree. The County officials made a free deliberate choice when it agreed to settle this dispute and terminate the long costly litigation. The parties engaged in arms-length bargaining and the detainees have a justified expectation that the bargain freely entered will be honored. As the detainees have pointed out, remedial measures regarding the jail population were not implemented until after the petition for a Rule to Show Cause was filed.

This Court finds that the County Defendants have failed to show an unforeseen and substantial change in circumstances since the entry of the bargained for Consent Decree nor an extreme hardship if their proposed remedy is not granted. The district court did not abuse its discretion in denying the County defendants' Rule 60(b) motion to modify. *DeFilippis* v. *United States,* 567 F.2d at 343; *Ben Sager Chemicals International, Inc.* v. *E. Targosz & Co.,* 560 F.2d 805, 809 (7th Cir. 1977); *Beshear* v. *Weinzapfel,* 474 F.2d 127, 130-31 (7th Cir. 1973).

II.

March 22 Release Order

The County defendants contend that they have carefully shaped a remedy for the overcrowding conditions through the proposed new construction and limited emergency double-bunking. They submit that they have submitted a reasonable constitutional remedy which directly addresses the issue of overcrowding and does not inter-

fere with decisions of the state court system. The County officials argue that the district court's release order is an unwarranted intrusion into the County's authority.

The issue before this Court is whether the district court's choice of remedies for the overcrowded conditions and enforcement of the Consent Decree was an abuse of its discretion. As the Supreme Court held in *Lemon* v. *Kurtzman,* 411 U.S. 192, 200 (1973) when "shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *See also United States* v. *City of Chicago,* 631 F.2d 469 (7th Cir. 1980). An abuse of discretion occurs when "no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion can be found." *Harrington* v. *DeVito,* 656 F.2d 264, 269 (7th Cir. 1981), *cert. denied,* 455 U.S. 993 (1982).

The March 22 Opinion and Order clearly indicated that the district court was aware of, and sensitive to, the need to strike a proper balance between the integrity of the Consent Decree and the principles of federalism. R. 31, p. 2. The implementation of a population ceiling was recommended by the Monitor. The figure of 4500 reached after hearings and commendations by counsel reflected the capacity of the facility, minus a numerical factor as a buffer for repairs, etc. The district court, when it set the "cap," clearly left to the appropriate state and county agencies the determination of the means to reach the population "cap." While the appropriate agencies in early 1983 began to consider remedial measures, it was Judge Shadur's determination that "the problem will not go away and that a means must be selected to assure effective compliance with the ceiling set by the Order." *Id.* at p. 4. (The district court had previously set a date of February 11, 1983 but that date had been postponed pending the recommendations of the parties). These appropriate agencies have failed to come up with a proposal within the principles of the Decree.

The Release Order called for the reduction of the inmate population through the release, on their own recognizance, of low-bond pretrial detainees as necessary to reach the "cap." These releases would occur after April 15, 1983 "if no Illinois state court of competent jurisdiction has then specified a different method of selecting." *Id.* at p. 5. As Judge Shadur pointed out, the March 22 Order placed the primary and direct responsibility on the state court judiciary to meet the problems in the prisons and begin corrective methods. *Id.* The district court fashioned a remedy placing the responsibility for the jail on the appropriate parties and not in the federal court.

It should be noted that the persons eligible for possible release on their own recognizance are low-bond pretrial detainees. These individuals have not been convicted of the crime for which they are being detained, but are in the preliminary stages of a criminal proceedings and are unable to make bail. Low-bond detainees ($500 or less) averaged over 800 inmates in the County facilities from August-November 1982. R. 22, Ex. 3, p. 8. These detainees represented 60% of the increase in the jail population in 1982. *Id.* In November 1982, approximately 200 jail inmates required bonds of less than $100 and another 200 required bonds up to $200. Plaintiffs' Sur-Reply filed December 13, 1982, Ex. B, Appellants' Appendix, p. A-145. Thus, the possible beneficiaries of the Release Order are not convicts nor are they subject to serious state bail requirements.

The district court, when it entered the March 22 Opinion and Order was confronted with a nearly year-old Consent Decree and substantial noncompliance with that Decree by the County defendants. These officials had been invited to develop a workable remedy and their only suggestion was to modify the bargained-for Consent Decree. The district court did not act precipitiously but rather acted fairly and reasonably to ease a critical problem. As Judge Shadur pointed out in his Opinion, State and County agencies must address this problem.

> From a longer range point of view, the Cook County Board has just authorized construction of supplemental facilities with a capacity of housing 500 inmates—a step that can be taken much more expeditiously than a more ambitious building project. That too is a means that should have been addressed before the situation reached its current crisis proportions, but once in place it will obviously ease (though not solve) the situation. This entire matter of overcrowding needs constant monitoring to prevent recurrence, and one of the real dangers of a "solution" that involves simply increasing the number of available spaces is that it might create a tendency for the various responsible state agencies to ease up and let the problem get out of hand again—not intentionally, but because the matter might no longer be viewed as a pressing immediate need. Unfortunately correctional institution population tends to operate somewhat like the law of physics in which a gas always expands to fill the available space.
>
> R. 31, p. 4 n.5.

This Court is under the impression that the County defendants are attempting to avoid compliance with the Consent Decree by rewriting the terms which they have difficulty meeting. It was reasonable for the district court to enter what it considered the best remedy to the overcrowding in the County jail facilities.

Conclusion

This Court affirms the Opinion and Order of the district court of March 22, 1983 and revokes the Stay of that Order granted April 15, 1983 by this Court. This case is remanded to the district court for supervision of the March 22, 1983 Order and the underlying Consent Decree. This Court awards attorney's fees and costs to the appellees.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 C 2949

DAN DURAN, et al.,

Plaintiffs,

v.

RICHARD ELROD, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs have petitioned for a rule to show cause why defendants[1] should not be held in contempt for violating the April 9, 1982 Consent Decree (the "Decree") in this action. Defendants have freely admitted they are in violation of a whole host of provisions of the Decree and that essentially all the violations are directly related to the terribly overcrowded conditions at the Cook County Department of Corrections (the "D of C").[2] Defendants

[1] Defendants are Cook County Sheriff Richard J. Elrod, Executive Director of the Cook County Department of Corrections Phillip T. Hardiman, Cook County Board of Commissioners President George Dunne and the other members of that Board, and the members of the Cook County Board of Corrections.

[2] When the petition was first filed November 4, 1982, over 800 inmates were sleeping on floors, many without mattresses. As of defendants' latest status report (March 21, 1983), the efforts referred to in this opinion had brought the D of C population down to 4,687. Though the report did not specify the total number of available beds, the information on that score in prior reports would indicate that the number of inmates currently sleeping on mattresses (without beds) was likely in the range of 100 to 200.

say accurately enough that for the most part the matter of overcrowding is not within their control, for the population input at the D of C is generated by the state criminal justice system and not by defendants.

From the outset this Court has been concerned with striking the proper balance between maintaining the integrity of this Court's orders[3] and respecting the principles of federalism. After several hearings and status reports, this Court determined that goal could best be served by establishing a ceiling on the number of inmates to be confined in the present D of C facilities at any one time. That form of resolution, strongly recommended by the John Howard Association (designated by the parties to serve as the monitor under the Decree), is well supported by precedent and is within this Court's jurisdiction under 28 U.S.C. §2202. Equally importantly, it leaves the *means* of conforming to the ceiling to the relevant branches of state government. Thus this Court does not inappropriately involve itself as the day-to-day overseer of the functioning of a part of the state's penal system —a prospect that, when it has had to be faced elsewhere in the country, has inevitably created great tensions.

There is no dispute between the parties that though the nominal bed capacity of the D of C is 4,677, at all times approximately 200 beds are in fact unavailable for various reasons. This Court's January 25, 1983 order (the "Order") accordingly so found, and it therefore re-

---

[3] Although the Decree was initially consensual (and contractual) in nature, its entry by this Court made it enforceable like any court order. Decree ¶12.D provided:

> This Order, including its attached Appendices constitutes a final disposition of this litigation as to all defendants with respect to the injunctive and declaratory relief claimed by plaintiffs and the class. Jurisdiction of this cause is hereby specifically retained by the Court to enter further orders necessary or appropriate to enforce the terms of this Order.

quired defendants to reduce the inmate population at the D of C to 4,500 persons. It initially set a date of February 11, 1983 for that purpose, but circumstances proved that time period inadequate.

Since that time defendants' periodic status reports (also called for by the Order) have shown a *general* downward trend[4] in inmate population, as various partial solutions have been put into effect by the various state authorities. This Court has been greatly assisted in evaluating the problem by the January 31, 1983 technical assistance report from the National Institute of Corrections and, most recently, by a March 20, 1983 report from consultant Joseph A. Trotter, Jr. of that Institute's staff (Mr. Trotter was working on a contractual basis, and his report did not represent the official views or policy of the Institute).

From the latest consultant's report it appears that constructive efforts continue to be made by various branches of state government to deal with the matter. Currently most promising is the state judiciary's contemplated establishment of a night court system to provide effective screening, when individuals are arrested or processed after normal court hours, so they may avoid ever getting into the detention system at all. That eminently sensible response would seem to have been called for long since.[5] It is hoped to be implemented "as early as April" according to the consultant.

---

[4] Differing circumstances from week to week preclude a uniform pattern of declining population at the D of C. Accordingly there have been some spurts upward in the amount of overcrowding during the past two months.

[5] From a longer range point of view, the Cook County Board has just authorized construction of supplemental facilities with a capacity of housing 500 inmates—a step that can be taken much more expeditiously than a more ambitious building project. That too is a means that should have been addressed before the situation reached

From the regular status reports since the Order was entered, it has become increasingly plain that the problem will not go away and that a means must be selected to assure effective compliance with the ceiling set by the Order. Again this Court has taken into account the relevant considerations of federalism, while at the same time holding the parties to their agreements as embodied in this Court's formal order approving the Decree. This Court has determined that the most appropriate measure is one that follows the precedent established by Judge Lasker of the United States District Court for the Southern District of New York in dealing with comparable problems in the New York metropolitan area correctional system *Benjamin* v. *Macolm,* 75 Civ. 3073 (MDL) and related cases June 23, 1981).

This Court therefore orders (as did Judge Lasker) that if compliance with the Order requires a reduction in inmate population at the D of C at any time after April 15, 1983 and that no Illinois state court of competent jurisdiction has then specified a different method of selecting the persons to be released to accomplish such reduction, Sheriff Elrod and Director Hardimen are directed to release on their own recognizance the persons held in default of the lowest amount of bail, and among persons

---

* (Continued)

its current crisis proportions, but once in place it will obviously ease (though not solve) the situation. This entire matter of overcrowding needs constant monitoring to prevent recurrence, and one of the real dangers of a "solution" that involves simply increasing the number of available spaces is that it might create a tendency for the various responsible state agencies to ease up and let the problem get out of hand again—not intentionally, but because the matter might no longer be viewed as a pressing immediate need. Unfortunately correctional institution population tends to operate somewhat like the law of physics in which a gas always expands to fill the available space.

held on the same amount of bail the ones who have been confined for the longest time. This order leaves the primary and direct responsibility with the state court judiciary, where both the litigants and this Court agree it belongs.

This order also confirms the denial of defendants' motion or double celling of Division I at the D of C. That would represent a step backward from the salutary provisions to which defendants agreed when they co-authored the Decree.

.....

Milton I. Shadur
United States District Judge

Date: March 22, 1983

NO. 83-1082

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

RICHARD J. ELROD, Sheriff of Cook County, et al.,

Petitioners,

-vs-

DAN DURAN, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RUTHANNE DeWOLFE
RICHARD JAY HESS
LESLIE ANN JONES
ROBERT E. LEHRER
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether a federal district court abused its discretion in refusing to modify a one year old Consent Decree that had resolved an eight year old jail conditions suit?

2. Whether a federal district court abused its discretion in remedying continuing and substantial noncompliance with a Consent Decree?

PARTIES TO THE PROCEEDINGS

Plaintiffs, the respondents here, are Dan Duran, Bruce Johnson, Robert O'Brien, Al Sana Caruth, John Norman, and Drexel Holland, individually and on behalf of all others similarly situated. Defendants, petitioners here, are identified in the Petition for Certiorari 1 n* and 2 n*.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	i
TABLE OF AUTHORITIES	iii
STATUTORY PROVISION INVOLVED	v
STATEMENT OF THE CASE	1
ARGUMENT	
I. INTRODUCTION	9
II. THE COURT OF APPEALS' DECISION PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	10
A. Whether The Court Of Appeals Properly Affirmed The District Court's Refusal To Modify The Consent Decree Presents No Question Of Federal Law Worthy Of This Court's Review	10
B. Whether The Court Of Appeals Properly Affirmed The Enforcement Order Pre- No Question Of Federal Law Worthy Of This Court's Review	15
III. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' DECISION AND WOLFISH AND Di BUONO	24
CONCLUSION	26

TABLE OF AUTHORITIES

Page(s)

Cases:

Bell v. Wolfish, 441 U.S. 520 (1979) ..... 16, 17, 19 20 ,24, 25

City of Los Angeles v. Davis, 440 U.S. 625 (1979) 22

Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) 16, 17

De Filippis v. United States, 567 F.2d 341 (7th Cir. 1977) 12

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 16

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938) 12

Gerstein v. Pugh, 420 U.S. 103 (1975) 22

Hutcraft Van Service, Inc. v. City of Urbana Human Relations Commission, 104 Ill. App. 3d 817, 433 N.E.2d 329 (1982) 15

Hutto v. Finney, 437 U.S. 678 (1978) 16, 17

Mayberry v. Maroney, 529 U.S. 332 (3d Cir. 1976) 12

Mayberry v. Maroney, 558 F.2d 1159 (3d Cir. (1977) 12

Milliken v. Bradley, 433 U.S. 267 (1977) 16, 17

Pennhurst State School & Hospital v. Halderman, U.S.L.W. 4155 (U.S. Jan. 23, 1984) (No. 81-2101) 14

People v. Snow, 340 Ill. 464, 173 N.E. 8 (1930) 24

Rizzo v. Goode, 423 U.S. 362 (1976) 16

Rozner v. Korshak, 55 Ill. 2d 430, 303 N.E.2d 389 (1973) 15

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 16, 17

Union County Jail Inmates v. Di Buono, 713 F.2d 984 (3d Cir. 1983) 24, 25

United States v. Armour & Co., 402 U.S. 673 (1971) 9

United States v. Georgia Power Co., 634 F.2d 929 (5th Cir. 1981) 15

Page(s)

United States v. Swift & Co., 286 U.S. 106 (1932) 11, 12, 13

Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983) 12

Washington v. Washington State Commerical Passenger Fishing Vessel Association, 443 U.S. 658 (1979) 16, 17

Wolf v. Weinstein, 372 U.S. 633 (1963) 14

Younger v. Harris, 401 U.S. 37 (1971) 16, 17, 22

Constitutional Provisions, Statutes and Rules

Fed. R. Civ. P. 60(b) 10, 12, 20

Ill. Const. art. VII, § 6(a) 15

Ill. Const. art. VII, § 6(g) 15

Ill. Const. art. VII, § 6(h) 15

Ill. Rev. Stat. ch. 16, § 81 (1981) 23

Ill. Rev. Stat. ch. 38, § 110-5 (1981) 23, 24

Ill. Rev. Stat. ch. 38, § 1003-15-2 (1981) 15

Ill. Rev. Stat. ch. 75, § 10 (1981) 23

Ill. Rev. Stat. ch. 75, § 24 (1981) 23

Sup. Ct. R. 17.1(a) 24

Sup. Ct. R. 17.1(c) 10, 17, 24

Sup. Ct. R. 21.1(a) 11

4 Ill. Admin. Reg. 189 (July 11, 1980) 15

STATUTORY PROVISION INVOLVED */

Federal Rule of Civil Procedure 60 provides, in relevant part:

> Rule 60. Relief from Judgment or Order
>
> * * *
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> * * *
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.
>
> * * *

---

*/ Petitioners cite U.S. CONST. amend XIV, § 1 and 42 U.S.C. § 1983, as the constitutional and statutory provisions this case involves, within the meaning of Sup. Ct. R. 34.1(f). Respondents disagree, see Argument, infra passim.

NO. 83-1082

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

RICHARD J. ELROD, Sheriff of Cook County, et al.,

Petitioners,

-vs-

DAN DURAN, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI

STATEMENT OF THE CASE

1. Plaintiffs ("respondents") are a class of all pretrial detainees at the Cook County Jail ("Jail") (Complaint 10/11/74; Order Certifying Class 6/23/75). 1/ Petitioners are various Cook County, Illinois officials with responsibility for the Jail (Petition for Certiorari ("Pet.") 1 n.* and 2 n.*). Respondents claimed (Second Amended Complaint 9/7/76) that petitioners were violating their rights under the eighth and fourteenth amendments of the United States Constitution by, inter alia:

> (a) Forcing them to live in overcrowded conditions where individuals had to sleep less than two feet apart, without bedding, on the concrete floors of hallways and dayrooms (id. at ¶ 13(A)(1),(3)).

1/ The record in this case is currently lodged with the Clerk of Court, Northern District of Illinois, Eastern Division. Except as noted at nn. 3 and 5 infra, citations to that record here include identification of the document referred to, and the date it was filed with the court, or entered upon the docket, as shown on the district court docket sheet.

(b) Failing to provide them essential items of personal hygiene such as soap, clean clothes, and bedding for days and weeks at a time (id. at ¶ 13(E)).

(c) Forcing them to live in quarters without working plumbing, proper ventilation, and lighting (id. at ¶ 13(A)(6) and (D)(2)).

(d) Restricting them to sunless dayrooms adjoining their cells or dormitories, and failing to provide regular outdoor physical activity (id. at ¶ 13(D)).

2. From 1977 through 1980, the parties engaged in extensive discovery in preparation for trial (R. Docket entries 2/11/77 - 6/24/80).

3. After prolonged and intensive settlement negotiations (R. Docket entries 9/23/80 - 4/5/82), the parties agreed to the entry of a consent decree resolving all of respondents' claims (Consent Decree 4/9/82 ¶ E). The parties signed the Consent Decree on February 4, 1982 (Order Providing Notice to Class 2/4/83). It required petitioners to, inter alia: provide adequate exercise periods (Consent Decree 4/9/82 ¶ 8(A), (B), (C), (D), (E)); provide food service that meets minimal nutritional and sanitary standards (id. at ¶ 4(A)(13)); provide adequate environmental health conditions (id. at ¶¶ 5 and 10); provide a permanent bed for every inmate in areas designed as sleeping quarters (id. at ¶ 2(A)); limit the number of people housed in each living unit (id. at ¶ 2(A)(1), (2), (3)); 2/ and not double bunk in Division I (id. at ¶ 2(A)(1)) (double bunking was permitted in the other Divisions (id. at ¶ 2(A)(3)).

4. Division I is the oldest division at the Jail (Master Plan Cook County Department of Corrections 4/2/75 at 5-6), a "Bastille-like structure" (id. at 6) the petitioners'

2/ The limits are imposed by reference to how persons must be housed in each Division of the Jail: 52 persons per Dormitory in Division II, double bunking in Divisions III, IV, V, and VI, and single bunking in Division I (Consent Decree ¶ 2(A)(1), (2), (3)). The precise population limit of the Jail can therefore be calculated by applying these standards to the actual physical facilities in each Division.

"Master Plan" for the Jail suggested might reasonably be demolished (id. at Exhibit 1). In the litigation, respondents sought demolition of that structure or its radical renovation, arguing and introducing evidence to establish that the structure was unfit for human habitation (Motion for Preliminary Injunction and Supporting Memorandum 7/3/78). As part of the Consent Decree, however, respondents agreed to the continued use of Division I, provided petitioners renovated it and did not double bunk there (Consent Decree 4/9/82 ¶ 2(A)(1)). The renovations agreed to were less extensive than those respondents originally sought (compare Motion for Preliminary Injunction 7/31/78 with Consent Decree 4/9/82 ¶ 2(A)(1)). Respondents also sought in the litigation to eliminate the use of dormitories at the Jail (Second Amended Complaint 9/7/76 ¶ 13(A)(3), (4), (5), and (6)); but agreed in the Decree to their continued use (Consent Decree 4/9/82 ¶ 2(A)(2)).

5. The district court approved the Consent Decree on April 9, 1982 (Consent Decree 4/9/82) and appointed John Howard Association officials ("Monitors") to monitor petitioners' compliance with it (id. at ¶ 12(B)). Shortly thereafter, respondents discovered that petitioners had failed to end their practice of having detainees sleep on concrete dayroom floors throughout the Jail (Plaintiffs' Reply to Defendants' Response to Petition for Rule to Show Cause, Exhibit C 12/13/82; Director's Daily Log ("Dir. Logs") 5/9/82 3/). Respondents

---

3/ The Director's Daily Logs are daily jail statistics filed with the court that show the number of detainees and beds in each division of the Jail. They are identified here by reference to the day the log describes rather than the date filed with the court.

On April 9, 1982, the day the Consent Decree was entered, there were 313 detainees sleeping on the dayroom floors (Dir. Log 4/9/82). On July 9, 1982, there were 300 detainees sleeping on the floors (Dir. Log 7/9/82).

objected to this violation of the Consent Decree and attempted, through a series of meetings with petitioners, to alleviate this condition (Plaintiffs' Reply to Defendants' Response to Rule to Show Cause, Exhibit C 12/13/82).

6. On October 9, 1982, the Monitors reported to the Court that there was substantial non-compliance with virtually all aspects of the Consent Decree and that overcrowding at the Jail -- hundreds of detainees were sleeping on the concrete Jail floors without, in many cases, mattresses or blankets -- was the primary cause of the noncompliance (Interim Compliance Report 10/21/82). 4/ Specifically, they found that:

> (a) On September 27, 1982, there were 436 detainees sleeping on the dayroom floors, "large numbers without mattresses or blankets" (id. at 3). Most of the detainees sleeping on the dayroom floors were being held in default of the lowest bonds, $35 to $150 (id. at 4);
>
> (b) Petitioners failed to provide such personal hygiene items as soap, towels, clean clothing, and bedding for many detainees for as long as 20 days (id. at 6);
>
> (c) Petitioners failed to implement the physical exercise program set forth in the Consent Decree (id. at 8);
>
> (d) The Jail contained stopped-up sinks, broken light fixtures and inoperative toilets (id. at 10);
>
> (e) "The critical issue of overcrowding has to be addressed and solved to hold any promise of compliance in the other areas" (id. at 12).

7. On November 8, 1982, respondents moved for issuance of a rule to show cause why petitioners should not be held in contempt for violating the Consent Decree (Pet. for Rule to Show Cause 11/2/82). Respondents later moved for remedial relief,

---

4/ The Jail overcrowding that had prevailed the day the Consent Decree was entered (n. 3, supra) thus persisted for the next six months. It persisted, in fact, until July 22, 1983, when the court of appeals affirmed the district court order petitioners seek review of here, and vacated its previous stay of that order (Dir. Logs 4/9/82 - 8/2/83). From April 1982 through July 1983, there were, at a minimum, 150 detainees sleeping on the dayroom floors every night (Dir. Logs 4/9/82 - 8/2/83).

pursuant to 28 U.S.C. § 2202, as an alternative to contempt sanctions (Plaintiffs' Reply to Defendants' Response to Petition for Rule to Show Cause 12/13/83).

8. At the November 8, 1982, hearing on their alleged noncompliance with the Consent Decree, petitioners accepted the Monitor's factual findings as "accurate," and the district court requested them to propose workable remedies (Trans. of Proceeding, 11/8/82 5/ at 4, 5).

9. On November 15, 1982, the Director of Medical Services for the Jail reported to the Monitors that the effects of overcrowding at the Jail were:

> (a) Increased suicides, psychoses and psychoneuroses, and inability to treat many mentally ill detainees (Plaintiffs' Reply to Defendants' Response for Rule to Show Cause, Exhibit D 12/13/82).
>
> (b) "Increased rates of illness, medical complaints, sexual assaults, trauma ... epidemics of body, head and pubic lice ...." The most serious infestations of lice occurred in Division II, the most overcrowded division (id.); and
>
> (c) Substantial increase in physical assaults on both guards and inmates at considerable cost to the Jail (id.).

10. At petitioners' request, the district court conducted a hearing on December 23, 1982, at which representatives of state and city agencies and administrative departments, invited by the petitioners, suggested solutions to the problem of overcrowding at the Jail (Trans. of Proceedings 12/23/82).

> (a) Superintendent of the Chicago Police Department Richard Brezczek stated that his agency supported reducing the Jail population by increased use of recognizance bonds instead of cash bonds (id. at 14-18);
>
> (b) Director of the Illinois Department of Corrections Michael Lane recommended placing a maximum limit or "cap" on the number of persons who could be housed at the Jail (id. at 25);
>
> (c) The Monitors recommended a cap on the Jail

5/ Transcripts of Proceedings are identified by reference to the date of the hearings transcribed.

population (id. at 3).

Petitioners offered no solutions of their own and expressed no opposition to the proposals of the state and city officials, including the proposal to release detainees on recognizance (id. at 23, 32-36).

11. After the December 23rd hearing, the district court conducted further hearings on the propriety of the type of explicit court order limiting the Jail population that the state and local officials had recommended (Trans. of Proceedings 1/3/83, 1/14/83). At the first of these hearings, on January 3, 1983, petitioners acknowledged that because of overcrowding at the Jail, they were not complying with the Consent Decree and acknowledged that conditions at the Jail were inhumane (Trans. of Proceedings 1/3/82 at 6). But petitioner opposed the imposition of contempt sanctions as ineffective to secure compliance with the Consent Decree.

12. Under the terms of the Consent Decree, the nominal capacity of the Jail was 4,677 inmates (Defendants' Response to Rule to Show Cause 12/1/82 at 1). As petitioners also acknowledged to the district court, however, there were ordinarily only 4,500 beds actually available at the Jail (Trans. of Proceedings 1/21/83 at 6). Thus, the Jail's actual capacity under the Consent Decree -- which required that every inmate have a bed in a designated sleeping area (e.g. a cell) (Consent Decree 4/9/82 ¶ 2(A) 6/) -- was 4,500; and on January 21, 1983, the district court entered an order directing petitioners not to permit the population of the Jail to exceed that figure.

6/ Paragraph 2(A) of the Consent Decree provides:

> Each pre-trial detainee shall have one permanent bed in a cell. No pre-trial detainee shall be housed where inmates are required to sleep on the floor, or on a mattress on a floor, or in any area not designated as sleeping quarters. (Consent Decree 4/9/82 ¶ 2(A)).

Petitioners never appealed that order.

13. On February 11, 1983, petitioners submitted a January 31, 1983, report by their consultant, the National Institute of Corrections ("NIC") of the United States Department of Justice (Defendants' Status Report, Exhibit 3 2/11/83). Petitioners had hired NIC to evaluate the overcrowding problem at the Jail and to propose solutions. NIC reported "[s]ignificant reductions could be safely made in jail population" (id. at 30). It outlined a series of recommendations to achieve those reductions, including the increased use of release on recognizance (id.).

14. On February 11, 1983, petitioners reported that several hundred detainees were sleeping on the dayroom floors (Defendants' Status Report 2/11/83). Petitioners also stated that they were considering construction of an additional 500-bed jail facility (id. at 5).

15. Also on February 11, petitioners filed a motion, pursuant to Fed. R. Civ. P. 60(b), that sought to modify ¶ 2(A)(1) of the Consent Decree to allow two persons per cell in Division I (Defendants' Motion for Modification of Consent Decree 2/11/82). That provision prohibited double bunking there (Consent Decree 4/9/82 ¶ 2(A)(1)).

16. The district court ultimately denied petitioners' motion (Order 3/21/83). Based on the evidence previously submitted, it stated that to modify the Consent Decree would represent a "step backward" from the January 25th order: it would increase the Jail population and frustrate any attempts to ameliorate those conditions at the Jail -- substantially all of which were caused by overcrowding (see ¶ 6, supra) -- that constituted continuing violations of the Consent Decree (Trans. of Proceedings 3/2/83 at 14-15; Memorandum Opinion and Order 3/22/83).

17. On March 2, 1983, petitioners reported to the court that several hundred detainees were sleeping on the dayroom floors every night (Defendants' Status Report 3/1/83). The district court suggested that petitioners devise a means for releasing detainees in order to reduce the population and asked the parties to submit criteria for release at the next hearing (Trans. of Proceedings 3/2/83 at 15-16).

18. The respondents subsequently submitted their proposed criteria for reducing the population -- release persons with the lowest bonds first (Plaintiffs' Proposed Criteria 3/8/83). Petitioners did not submit criteria; but neither did they oppose the idea of the district court directing them to release detainees to relieve overcrowding (Defendants' Status Report 3/9/83).

19. On March 22, 1983, petitioners reported to the court that there were 240 detainees sleeping on the dayroom floors (Defendants' Status Report 3/22/83). On the same date, the district court entered the order of which review is now sought. That order ("enforcement order") provided that if petitioners Elrod and Hardiman could not comply with the Decree by April 15th, then they should release on recognizance that number of detainees sufficient to provide each remaining detainee in the Jail a bed in a designated sleeping area, as provided in the Consent Decree (Order 3/22/82). The enforcement order further provided that those detainees released first, if release was required, should be those held in default of the lowest bail (Order 3/22/83).

20. On March 22, 1983, petitioners informed the court that the Cook County Board had, the previous day, authorized the prompt construction of an additional jail facility to house 500 inmates, which would take six to eight months to build (Defendants' Status Report 3/22/83). Construction of this facility

still has not begun (Pet. 3).

21. On March 30, 1983, petitioners appealed the March 22nd district court order to the court of appeals, which unanimously affirmed that order on July 22, 1983. Duran v. Elrod, 713 F.2d 242 (7th Cir. 1983); Pet. App. A.

22. Petitioners filed a petition for rehearing with a suggestion for rehearing in banc. On October 6, 1983 that petition was denied, no judge requesting a vote, and all judges on the original panel voting to deny rehearing (App. A hereto).

ARGUMENT

I. INTRODUCTION

Respondents filed this jail conditions suit in 1974 (Statement of Case ("Stmt.") ¶ 1). 7/ In April 1982, after 8 years of litigation, the district court approved a comprehensive Consent Decree that resolved all of respondents' claims (Stmt. ¶ 3). The Decree was the product of two years of intensive negotiations (id.), and its provisions embodied numerous concessions by both sides (id.). See United States v. Armour & Co., 402 U.S. 673, 681 (1971). The most important provisions of the Decree were the ones intended to limit severe overcrowding at the Jail (Consent Decree 4/9/82 ¶ 2). Both parties recognized that compliance with these provisions was essential if the conditions that gave rise to the lawsuit were to be corrected; they also recognized that overcrowding at the Jail frustrated petitioners' ability to comply with other provisions of the Consent Decree (Stmt. ¶¶ 6, 8).

7/ Respondents, in their Argument, cite principally to the Statement of the Case, rather than directly to the record. The Statement cites to the Record (see n.1, supra).

The court of appeals affirmed a March 1983 district court order denying petitioners' Fed. R. Civ. P. 60(b) motion to modify the April 1982 Consent Decree (Pet. App. A). The requested modification would have permitted the very overcrowding that petitioners themselves -- the officials charged with the Jail's administration -- had agreed to correct. The court of appeals also affirmed the district court's subsequent enforcement order which, once implemented, cured petitioners' long-standing and substantial noncompliance with the Decree (see n. 4, supra).

The record in this case raises unremarkable questions concerning the exercise of a district court's discretion in refusing to modify a consent decree and in remedying noncompliance with it. It is not a record from which petitioners can prepare a persuasive petition for certiorari. So, struggling against a factual record and a court of appeals' decision that can hardly be hidden, they suggest to this Court a different case than the one actually presented.

II. THE COURT OF APPEALS' DECISION PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Whether The Court Of Appeals Properly Affirmed The District Court's Refusal To Modify The Consent Decree Presents No Question Of Federal Law Worthy Of This Court's Review.

Petitioners invoke no less than three of the "special and important reasons" for granting certiorari set forth in Sup. Ct. R. 17.1. The one they urge most vigorously, however, is that the decision of the court of appeals presents an "important question of federal law which has not been, but should be, settled by this Court" (id. at 17.1(c); see Pet. 14-20).

Petitioners' argument is that the enforcement order is improper because modification of the Consent Decree was the required remedy. Indeed petitioners' view appears to be that if the district court properly exercised its discretion in refusing to modify the Decree, then the court of appeals affirmance of the enforcement order was correct (Pet. 4). Thus, they concede that the motion to modify the Decree to permit double-bunking should have "preclude[d] the ... release order" (id. at 16). And they state that the enforcement order is "wrong" (id. at 18), because it "ignored other available ... remedies for the enforcement of the Consent Decree" (id.). But the "other ... remedies" turn out to be just the "double bunking ... rejected by the district court" when it refused to modify the Decree (id. at 18, 20). The relationship between the two orders that petitioners press makes correct their suggestion (Pet. 17-18 n. **) that whether the district court erred in refusing to modify the Consent Decree is a question "fairly included," Sup. Ct. R. 21.1(a), within any question presented about the enforcement order (Pet. i).

While necessarily presented, this question is not, however, worthy of plenary review. In affirming the district court's refusal to modify the Consent Decree, the court of appeals applied those well established principles governing modifications of consent decrees that Justice Cardozo first formulated in United States v. Swift & Co., 286 U.S. 106, 114-15 (1932), and which scores of decisions since have developed. See, e.g., cases cited at Pet. App. 8a-10a. Petitioners do not seriously question these principles or otherwise suggest any reasons why they should be reexamined; and respondents know of no decision of any court of appeals, much less any of this

Court, that does so either. 8/

Unable to mount any legitimate attack against these standards, or to suggest why this Court should now want to re-examine them, petitioners are reduced to quarreling with the court of appeals' refusal to accept their explanation of why, under the facts of the case, they meet them (Pet. 15-16, 18). 9/ Even a strong argument concerning a lower federal court's understanding of the facts of a particular case is not, however, one that ordinarily prompts this Court's plenary review, under the Sup. Ct. R. 17 standards. See General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178 (1938).

8/ In asserting that this case raises a "subsidiary issue" of "whether the district court properly applied Rule 60(b) law" (Pet. 17-18), petitioners do cite, without explanation, Washington v. Penwell, 700 F.2d 570, 574 (9th Cir. 1983), De Filippis v. United States, 567 F.2d 341, 343-46 (7th Cir. 1977) and Mayberry v. Maroney, 529 F.2d 332, 335-36 (3d Cir. 1976) suggesting, that these cases are inconsistent with the court of appeals decision, or otherwise invite review of that court's application of the Rule 60(b) standards here. But the court of appeals itself cited De Filippis and a later opinion in Mayberry, 558 F.2d 1159 (3d Cir. 1977) in support of its decision (Pet. App. 8a-10a). And Penwell reaffirmed the principle that Fed. R. Civ. P. 60(b) relief from a consent decree was "extraordinary," 700 F.2d at 574, although it permitted modification of a provision of the decree there because a failure to do so in the court's view "would run afoul of the state's sovereign immunity" and so be constitutionally "impermissible" (id.). But petitioners do not argue here that the no double bunking provision they sought to modify is unlawful. All that remains of petitioners' passing dispute with the court of appeals' understanding of the law governing modification of consent decrees (Pet. 17-18 n. **) is some name-calling.

9/ This challenge, to be sure, impliedly urges a marked relaxation of the Swift standards which do not require, if they even permit, the modification sought here (see pp. 13-14, infra). Respondents note only that the relaxation petitioners thus seek would make the resolution of cases by consent extraordinarily unlikely; and those consent resolutions that are achieved fragile indeed, subject to the parties' repeated efforts to modify those terms they find no longer convenient.

Petitioners' challenge, moreover, to the court of appeals' application of the Swift standards to the facts of this case is weak indeed. They simply present, as they did before the court of appeals, the increase in jail population after April 1982 10/ (when the Consent Decree was entered) as the justification for double bunking (Pet. 7-9, 15-16). Under Swift and its progeny, one relevant inquiry in considering whether a consent decree should be modified is whether the "dangers" the consent decree was meant to address "have become attenuated." Swift, 286 U.S. at 119. Petitioners can hardly show that the dangers this Consent Decree was meant to address (see Stmt. ¶ 13 and p. 9, supra) "have become attenuated" by showing that overcrowding at the Jail had become worse.

Another relevant inquiry is whether there are any unanticipated or "unforeseen conditions" resulting in a "grevious wrong" to the party seeking the modification. Swift, 286 U.S. at 119. But petitioners' tale of "unforeseen conditions" is false. Overcrowding was a chronic problem, not one reflecting any unforeseen change in circumstances after the entry of the Decree. The Jail population and the extent of overcrowding were very nearly the same in March 1983, when the district court denied the motion to modify the Consent Decree, as they were almost a year before, when that Decree was signed and approved.11/

10/ Petitoners' graphs (Pet. 7-8) are misleading because they run only through 1982. The Director's Daily Logs show that, from January through March of 1983, the population of the Jail steadily decreased to a level virtually the same as those prevailing in April 1982 (compare Dir. Logs 1/6/83-3/25/83 with Dir. Log 4/9/82). That level persisted until July, 1983, when the court of appeals vacated its stay of the enforcement order (Dir. Logs 3/25/83-8/2/83).

11/ During February, March and April 1982, the Jail populaion hovered between 4400 and 4600 (Pet. 7), with 313 inmates

(footnote continued on page 14)

Over the course of a full year, and months after the influx of the new detainees on which the petitioners predicate their argument that the Consent Decree should have been modified, hundreds of detainees continued to sleep on the floor. But not until their own noncompliance with the Decree had occasioned the district court's scrutiny of their conduct and the threat of remedial orders, many months after the increase in population, did petitioners move to modify the Decree. Petitioners merely use the increased Jail population during the summer and fall of 1982 as a smoke screen behind which to hide their own lack of effort to comply with the Decree (see Pet. App. 13a).

The question whether the court of appeals properly affirmed the denial of the motion to modify is also inappropriate for review, because to reverse that decision, this Court would have to address state law issues that were never addressed below. See Wolf v. Weinstein, 372 U.S. 633, 636 (1963). The question whether double bunking of Division I violated Illinois law was fully briefed before the court of appeals, which, however, had no occasion to reach it. 12/ But to reverse the court of appeals' decision, this Court would be required to reach this question; for when modification of a consent decree would vio-

(footnote continued)

sleeping on the floor on April 9, 1982, the day the decree was approved (Stmt. ¶ 5). As of March 15, 1983, the total Jail population was 4703 with 240 inmates sleeping on the floor (Stmt. ¶ 19).

12/ The district court also did not address this question. Neither the enforcement order, nor the order denying the motion to modify were based in any way upon state law (Pet. App. A and B). See Pennhurst State School and Hospital v. Halderman, 52 U.S.L.W. 4155 (U.S. Jan. 23, 1984) (No. 81-2101) (voiding, as violative of the eleventh amendment, federal court injunction against state officials, to enforce state law). Pennhurst in no way supports the course petitioners implicitly urged upon the district court here: an order authorizing them to violate an unchallenged and indisputably valid state law.

late federal or state law, as respondents argue is so here, 13/ that surely requires denial of modification. See United States v. Georgia Power Co., 634 F.2d 929, 937 (5th Cir. 1981).

B. Whether The Court Of Appeals Properly Affirmed The Enforcement Order Presents No Question Of Federal Law Worthy Of This Court's Review.

Petitioners' challenge to the enforcement order is predicated upon a distorted account of what the district court did. Petitioners argue that the district court found double

---

13/ In the court of appeals, respondents argued that the Illinois County Jail Standards 8-1(A) and 8-2 forbade the double bunking petitioners sought. See 4 Ill. Admin. Reg. 189, 206 (July 11, 1980). Petitioners did not deny that the Standards did forbid such double bunking, but contended that Cook County, through its state law "home rule" status was not subject to the requirements of the County Standards. They make the same claim here, citing Ill. Const. art. VII, § 6(a) and Rozner v. Korshak, 55 Ill. 2d 430, 435, 303 N.E.2d 389, 391-92 (1973). This brief is not an appropriate vehicle for responding to that contention at any length, which implicates an arcane area of Illinois law. See Hutchcraft Van Service, Inc. v. City of Urbana Human Relations Comm., 104 Ill. App. 3d 817, 822-3, 433 N.E.2d 329, 333 (1982). We note only that Korshak, a tax case, involved a portion of the state home rule provision (Ill. Const. art. VII, § 6(g)) not even petitioners claim is at issue here. The provision that is principally relevant here, Ill. Const. art. VII, § 6(h), provides for the "exclusive exercise by the State of any power or function of a home rule other than a taxing power ...." Exercising exclusive state-wide power is just what the Illinois legislature did here in directing the State Department of Corrections to promulgate statewide jail standards, including those applicable to county jails. See Ill. Rev. Stat. ch. 38, § 1003-15-2 (1981).

As petitioners note (Pet. 15, n.*), the Illinois legislature has recently amended several provisions relating to the administration of Illinois correctional facilities. But any suggestion that the amendments free petitioners from state law obligations not to double bunk Division I is not well founded. The first amendment they cite relates only to state prisons, not county jails; and the second, while modifying the State Department of Corrections' authority respecting space standards, leaves intact its authority -- still exercised at 4 Ill. Admin. Reg. 189, 206, § 8-2 -- to prohibit double bunking.

bunking at the Jail to be constitutionally prohibited 14/ and ordered the release of detainees to enforce that constitutional finding (Pet. 14-15). In fact, the district court entered the enforcement order to remedy substantial noncompliance with a consent decree, and then only as a last resort after petitioners had squandered almost a year of opportunities to comply with that order -- and their own promises. Petitioners argue further that the enforcement order frustrates the operation of the state bail system, and involves the district court in ongoing supervisory management of the Jail (Pet. 14-15, 18-19). But this part of their account also is wrong.

Petitioners' account of the case seeks to invalidate the enforcement order by reference to well established judicial restraints on the exercise of federal equity power. See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 695-96 (1979); Hutto v. Finney, 437 U.S. 678, 687-88, 690-91 (1978); Dayton Board of Education v. Brinkman, 433 U.S. 406, 419-420 (1977); Milliken v. Bradley, 433 U.S. 267, 280-81 ("Milliken II") (1977); Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1, 15-16 (1971); Younger v. Harris, 401 U.S. 37, 43-46 (1971). This Court ordinarily describes these restraints as ones grounded in traditional "equitable" considerations. See, e.g., Milliken II, Swann. In appropriate cases equitable considerations interact with principles of federalism, Doran v. Salem Inn, Inc., 422 U.S. 922, 928 (1975); and this Court in fact often speaks of "equitable" and "federalism" principles in similar terms. See Rizzo v. Goode, 423 U.S. 362, 377-80 (1976). The principles of

---

14/ That is the clear implication of petitioners' contention that "[t]he Decision of the Court of Appeals conflicts with this Court's approval of inmate double bunking in Bell v. Wolfish, 441 U.S. 520 (1979)" (Pet. 14).

federalism do seem to have limited application, however, when, as in this case, the persons against whom the court's equitable power is directed are being held less to the command of the federal court than to their own promises, here embodied in a "plan," i.e., the Consent Decree, they themselves had helped "initially devise." Bell v. Wolfish, 441 U.S. 520, 562 (1979).

The question of federal law that petitioners -- in seeking review of the enforcement order -- present is thus one that invites this Court simply to reexamine the court of appeals' application of these well-settled principles of law to the facts of this case. But there is no real argument why this invitation carries with it an "important question of federal law which ... should be ... settled by this Court," Sup. Ct. R. 17.1(c), beyond the insistence that petitioners are aggrieved by that decision. Virtually any party who has suffered a defeat in the court of appeals can make this type of argument. To secure this Court's review, petitioners must present a more substantial reason, at least in the absence of a very clear showing that the principles governing the exercise of a federal court's remedial power were ones that first the district court, and then the court of appeals, substantially transgressed.

Petitioners make no such showing, or anything close to it. Nor does the record permit them to do so. The enforcement order in no way violated the restraints the decisions of this Court, see Washington, Hutto, Brinkman, Milliken II, Swann, Younger, placed upon the district court. It offers, rather, a model of accommodation with them.

First, when the district court entered the enforcement order, it was presented with a clear pattern of longstanding, continuing, and substantial noncompliance with the Consent Decree (Stmt. ¶ 6 n.4). Petitioners themselves do not dispute this. While they insist, incorrectly (see n.15, infra) that

they vigorously attempted to alleviate overcrowding at the Jail, they never argue that anything they did was effective.

Second, notwithstanding this noncompliance, the district court acted with great forbearance. The enforcement order was issued a full year after entry of the Decree that required prompt implementation, five and one-half months after the Monitors found petitioners in noncompliance, and four and one-half months after the district court invited petitioners to develop a workable remedy (Stmt. ¶ 8). Petitioners had many opportunities to comply with the Decree. But contrary to their claim that they "attempted at every stage to alleviate the overcrowding problem" (Pet. 15), they did little, if anything, before or after the entry of the order they now challenge, 15/ and nothing they did took the detainees off the concrete floors or promised to relieve overcrowding shortly (Stmt. ¶¶ 19, 20). Petitioners did not even authorize construction of their vaunted new jail facility until March 21, 1983 (Stmt. ¶ 20). That authorization was action which, if taken when the increase in the Jail population first became apparent in the summer of 1982, might have ensured that, just a day before the district court entered the enforcement order, petitioners might have been in full compliance with the Decree, or full compliance would have been imminent. Nor, except to promise to build a new facility, did petitioners follow the principal recommendations of their own consultants (see Defendants Status Report Exhibit 3,

---

15/ Petitioners' list a series of things they did to ease overcrowding at the Jail (Pet. 11). But none of these occurred before the January 25, 1983 order (Defendants' Status Report 2/10/83). The only earlier constructive step petitioners had taken was to provide, in December 1982, blankets and mattresses to the detainees (Pet. 10); Defendants' Response to Petition for Rule 12/1/82 at 1). Until then hundreds of detainees were sleeping on the floor without mattresses or blankets, a situation that had prevailed since the previous April (Stmt. ¶ 6; n. 4, supra.).

2/11/83, at 25-34).

Third, the enforcement order was precise and limited in scope. It reached only as far as necessary to cure the continuing breach of the Consent Decree. Petitioners were required to release only the number of detainees sufficient to ensure that the Jail population would not exceed the limits of the Consent Decree itself, as set forth in the January 25th Order (Stmt. ¶ 11). Compliance with the Consent Decree renders the enforcement order inoperative.

Fourth, the enforcement order does not involve the court in the day-to-day administration of the Jail. Indeed, it does not involve any judicial supervision at all. The parties measure compliance from the Director's Daily Logs (see n.3, supra), and the cure for noncompliance is defined and easily verifiable.

Fifth, the enforcement order was carefully crafted to leave petitioners the greatest possible administrative discretion. Petitioners quarrel with the standard of releasing those detainees held on the lowest bond (Pet. 19). Yet the district court invited petitioners to set different standards before the effective date of the order (Pet. App. 4b) and that option is still available to them.

Petitioners argue that the enforcement order is a usurpation of their authority to "initally devise" a remedy for the conditions at the Jail, citing Bell v. Wolfish, 441 U.S. 520, 562 (1979), to the effect that "the first question to be answered is not whose [remedial] plan is best, but in what branch of the Government is lodged the authority to initially devise the plan" (Pet. 14). And they assert that the petition is one that "invites the Court to reaffirm" that course as its "direction" (id.). What petitioners fail to acknowledge, however, -- and their failure infects virtually every point they raise against the enforcement order -- is that the authority

they claim was usurped was exercised by them. It was not the district court, but petitioners who, in negotiating and agreeing to the Consent Decree, helped "initially devise the plan," Wolfish, 441 U.S. at 562, for remedying conditions at the Jail. In affixing their signatures to that Decree, petitioners agreed that their remedial "plan" was, under all the circumstances, desirable and capable of achievement. The district court approved that plan, i.e., the Consent Decree, on that basis; and it was only when petitioners continued to fail to follow their plan, after ample time to do so voluntarily, that the enforcement order was entered.

Petitioners' plan was, to be sure, one they tried to modify; and it is indeed the relief sought by that requested modification (double bunking of Division I), coupled with petitioners' promise to build a new Jail promptly, that is petitioners' principal "reason" (Pet. 16, 18) why the enforcement order was "wrong" (id. at 18). Double bunking and the promise to build a new Jail are thus referred to as "different sides of the same coin" that, together, should have "preclude[d]" the enforcement order (id. at 16).

But neither side of this coin is good. First, the modification of the Decree to permit double bunking in Division I was not one that the Fed. R. Civ. P. 60(b) standards required the district court to make, if they even permitted it (see pp. 13-14, supra). Indeed, for petitioners to argue that the proposal to double-bunk Division I is part of a "remedy" (see Pet. 4, 15, 18) disfigures the concept. For, understood as a proposal to modify the Consent Decree, it emerges simply as an attempt to skirt the very legal obligations petitioners' transgression of which obliged the district court to consider equitable remedies in the first place. Second, petitioners' promise promptly to build a new jail facility was an empty one. Almost

a year after they told the district court that they had authorized construction of such a facility, that construction would begin shortly and would take six to eight months to complete, construction has not begun.

Petitioners' failure even to begin construction of the new jail facility coupled with the decrease in the Jail's population (in early 1983) to a level that has persisted, places this case in quite a different posture than when it was before the district court. When the district court denied the motion to modify and entered the enforcement order, it did so over petitioners' plea that an "unprecedented" (Defendants' Motion for Modification 2/10/83) increase in the Jail's population justified modification of the Consent Decree to permit double bunking in Division I. Petitioners asserted that the modification would only be "short-term" (Defendants' Status Report 3/9/83, Exhibit D) because a new jail facility would be built shortly. Events have by now, however, quite definitively robbed petitioners' plea of any vitality. There has been, in fact, no relevant increase in the Jail's population and, if the district court had permitted double bunking of Division I, there would have been nothing "short term" about it. That part of the Jail would remain double bunked today, and, insofar as any progress in the actual construction of the new jail facility would suggest, it would remain double bunked indefinitely. 16/

16/ Petitioners acknowledge that the "County's plans to construct a 500 bed facility suffered a setback in the fall of 1983, when the low bidder for the project was ... disqualified" (Pet. 3, n.*). But the delay in construction of the new jail facility is in fact more substantial than that concession would suggest. As of the date of submission of this brief, there is still no builder under contract to build the jail. This is an obvious source of discomfort for petitioners (id.). But the (uncertain) prospect of completion of a new jail facility at any time in the next year or so carries with it a different type of discomfort

(footnote continued on page 22)

Petitioners argue that the "release order substitutes a truncated federally imposed recognizance scheme in place of Illinois' bail bond system ... [established by] the Illinois General Assembly" (Pet. 18). 17/ The enforcement order does not involve any such substitution. The order itself is not directed in any way against the state bail statute (cited at Pet. 18 n. *); and neither that statute nor the operation of the state court bail system have ever been at issue in this case. The suggestion that the enforcement order was predicated upon "dissatisfaction with the state court bail system" (Pet. 19), or indeed involved any determination respecting it or state bail legislation, is thus without any support in the record, and petitioners cite none. As the court of appeals recognized (Pet. App. 11a-13a), that order was predicated solely upon petitioners' continuing noncompliance with the Consent Decree.

(footnote continued)

for them, so far as it affects whether this case is appropriate for review. Petitioners present the construction of a new jail facility as making very unlikely any continuing violations of the Consent Decree and as remedying the effects of past noncompliance (Pet. 3-4, 15, 18). If petitioners are correct, however, this case may become moot. See City of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). Petitioners are thus in the curious position of predicating their plea to this Court for review upon an event (the prospective completion of a new jail facility) that, if it elicits this Court's interest in review, also holds a promise of eliminating the need for or possibility of that review.

17/ When this case was before the court of appeals, petitioners pressed the argument that the enforcement order unduly interferred with the merits of the state court criminal prosecutions. See Younger v. Harris, 401 U.S. 37 (1971). The court of appeals rejected that contention (Pet. App. 10a-13a). Petitioners now virtually abandon the argument, and at one point appear to disavow it (Pet. 18-19). What remains (id. at 14), is definitively rebuffed by this Court's unanimous decision in Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975). For here, as in Gerstein, "[t]he injunction was not directed at the state prosecution as such, but only at ... an issue that could not be raised in defense of the criminal prosecution ... [that] could not prejudice the conduct of the trial on the merits." Id.

The state bail system remains unaltered by the enforcement order. Both before and after entry of that order, bail is initially set for persons accused of crime, either pursuant to Ill. Rev. Stat. ch. 38, § 110-5 (1981) (judicial imposition of bail), or pursuant to Ill. Rev. Stat. ch. 16, § 81 (1981) (law enforcement officials' imposition of bail). The enforcement order has no play in the determination of bail made under these statutory provisions. Under the enforcement order, it is true, some detainees have been released from incarceration after bail was set; but that result was not one that the order directly or necessarily dictated. The enforcement order bears only upon detention in the Jail itself (Consent Decree 4/9/83; Pet. App. B). Petitioners retain the authority, under the Consent Decree, under the enforcement order, and under state law, to confine detainees in other facilities. See, e.g., Ill. Rev. Stat. ch. 75, § 10 (1981) (affording petitioners the option of remitting detainees to "jail" of "another county" if their "jail ... is insufficient"); Ill. Rev. Stat. ch. 75, § 24 (1981) (authorizing petitioners to pay for those facilities necessary "[to] keep[] and maintain[] [its] prisoners ..."). If there is any alteration in the operation of the state bail system, as petitioners posit, it is attributable to them. 18/

18/ Bereft of logical support for their argument that the enforcement order alters the state bail system, petitioners are reduced to quarrelling not with the idea of release itself, but with the standard for release. They suggest that detainees unable to satisfy low bond requirements are less likely than others to appear for trial if not confined (Pet. 19-20). There is no support in the record for this contention. More importantly, the notion that the amount of bail bears "no relationship" (id. at 19) to the likelihood of appearance at trial conflicts with the view of the Illinois legislature, as expressed in the bail statute (Ill. Rev. Stat. ch. 38, § 110-5 (1981)) to which petitioners profess their allegiance. See People v. Snow, 340 Ill. 464, 467, 173 N.E. 8, 9 (1930). And there is no support in the record for petitioners' suggestion (Pet. 19)

(footnote continued on page 24)

III. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' DECISION AND WOLFISH OR Di BUONO.

Petitioners argue that the court of appeals' decision conflicts with this Court's decision in Bell v. Wolfish, 441 U.S. 520 (1979), and with Union County Jail Inmates v. Di Buono, 713 F.2d 984 (3d Cir. 1983) as well (Pet. 14, 21). See Sup. Ct. R. 17.1(a), (c). This contention is wrong. Wolfish addressed the scope of the constitutional rights of pretrial detainees, 441 U.S. at 523, and this Court held that double bunking in the context of all the conditions at a particular detention facility violated no constitutional commands. Id. at 543. Following Wolfish, the Third Circuit concluded that, in the context of the totality of the Union County Jail conditions, one defendant's proposed double bunking remedy passed "constitutional muster." Di Buono, 713 F.2d at 996. Neither Wolfish nor Di Buono concerned the issue presented here -- the scope of a federal court's remedial power to enforce a valid and binding consent decree, in which petitioners had agreed to provisions limiting severe overcrowding. The district court here merely enforced such an agreement, and Wolfish and Di Buono thus have no application.

Only petitioners' obfuscation of the Consent Decree, "hammered out after lengthy negotiations between the parties" (Pet. 6), permits them to argue to the contrary. Citing Wolfish, 401 U.S. at 562, they say that the question presented here is "whether the district court has, indeed, made an in-

(footnote continued)

that those released under the district court order had been confined under high bail requirements. The record indicates that all those released have been confined for failure to meet very low ($35-$200) bonds (Stmt. ¶ 6).

correct 'judgment call' in an area 'confined [sic 19/] to officials outside the Judicial Branch of Government'" (Pet. 20). But the "judgment call" here did not concern the constitutionality of conditions at a jail, as in Wolfish and Di Buono; it concerned modification and enforcement of a consent decree.

Petitioners' nevertheless assert that Di Buono "reversed a release order [ ] in precisely the same context of local jail overcrowding in the face of a consent decree ...." (Pet. 21). But in Di Buono, the defendant that had proposed double bunking was not a party to a consent decree, 713 F.2d at 988, and those defendants who were parties to a consent decree were obliged to discharge their duties under it. Id. at 989-90. 20/

The orders petitioners seek review of here arose from their failure to comply with a "plan," Wolfish, 441 U.S. at 562, that they themselves had helped "devise," Id., which they promised to obey, and were then bound to obey when the district court approved and entered the Decree. When petitioners broke their promises, and so violated their obligations under the Decree, they asked the district court to be released from their promises and that Order. But promises should be kept and court

---

19/ The word in the opinion is "confided."

20/ The difference between petitioners and the Di Buono appellant is not limited to the presence of a binding and valid consent decree. Petitioners here were in violation of the Consent Decree for over nine months, before they finally took any action at all to remedy their non-compliance with the Decree (see n.15, supra); what they then did was ineffective and what they proposed to do, illusory (n.16, supra). In contrast to petitioners' recalcitrance, the Di Buono appellant "ha[d] in due course and in evident good faith come forward at the earliest opportunity with a remedial scheme to cure the violations ...." 713 F.2d at 1002.

orders obeyed, unless there are awfully good reasons why not. Exercising its discretion, the district court found that there were no such reasons, and no argument has been presented here that should prompt this Court to review the court of appeals' judgment affirming that decision.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

Robert E. Lehrer

ROBERT E. LEHRER
One of the Attorneys for Respondents

RUTHANNE DeWOLFE
RICHARD J. HESS
LESLIE ANN JONES
ROBERT E. LEHRER
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Respondents

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 6, 1983

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. ROBERT A. GRANT, Senior District Judge*

DAN DURAN, et al.
Plaintiffs-Appellees,

No. 83-1574 vs.

RICHARD ELROD, et al.
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74 C 2949
Milton I. Shadur, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by the defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

*The Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, sitting by designation.

EXHIBIT A

NOTARIZED STATEMENT OF MAILING

RICHARD JAY HESS, being duly sworn, deposes and says that he is one of the attorneys for respondents, and is a member of the bar of this Court; and that on February 24, 1984, and to his knowledge, one (1) original and ten (10) copies of Respondents' Brief in Opposition to Petition for a Writ of Certiorari and copies of Respondents' Motion to Proceed In Forma Pauperis were deposited in a United States mailbox at 343 South Dearborn Street, Chicago, Illinois 60604, with first class postage prepaid, properly addressed to Alexander L. Stevas, Clerk, United States Supreme Court, Supreme Court Building, Washington, D.C. 20543.

Richard Jay Hess
RICHARD JAY HESS

SUBSCRIBED AND SWORN to
before me this 24th day
of February, 1984.

Barbara M Moore
NOTARY PUBLIC

CERTIFICATE OF SERVICE

RICHARD JAY HESS certifies that he is one of the attorneys for respondents and that on February 24, 1984, two (2) copies of Respondents' Brief in Opposition to Petition for a Writ of Certiorari and two (2) copies of Respondents' Motion to Proceed In Forma Pauperis were served upon the attorney for all petitioners: Richard J. Daley, State's Attorney of Cook County, 500 Richard J. Daley Center, Chicago, Illinois, Attn: Henry A. Hauser. Service was made by depositing these copies in a United States mailbox at 343 South Dearborn Street, Chicago, Illinois 60604, first class postage prepaid, properly addressed to Richard J. Daley, Esq.

Richard Jay Hess

RICHARD JAY HESS

Supreme Court, U.S.
FILED
FEB [illegible]
ALEXANDER L. STEVAS
CLERK

NO. 83-1082

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

RICHARD J. ELROD, Sheriff of Cook County, et al.,

Petitioners,

-vs-

DAN DURAN, et al.,

Respondents.

RESPONDENTS' MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondents, pursuant to Sup. Ct. R. 46.1, and for the reasons stated in the attached affidavit, move for leave to proceed in forma pauperis before this Court. Respondents, a class of pre-trial detainees at the Cook County, Illinois jail, sought leave to proceed in forma pauperis before the United States District Court for the Northern District of Illinois; and on October 25, 1974 this motion was granted.

Respectfully submitted

Robert E. Lehrer
ROBERT E. LEHRER
One of the Attorneys for Respondents

RUTHANNE DeWOLFE
RICHARD J. HESS
LESLIE ANN JONES
ROBERT E. LEHRER
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Respondents

NO. 83-1082

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

RICHARD J. ELROD, Sheriff of Cook County, et al.,

Petitioners,

vs.

DAN DURAN, BRUCE JOHNSON, ROBERT O'BRIEN, AL SANA CARUTH, JOHN NORMAN, and DREXEL HOLLAND, individually and on behalf of all others similary situated.

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED AS RESPONDENT IN FORMA PAUPERIS

I, BRUCE JOHNSON, being first duly sworn, depose and say that I am one of the named plaintiffs and class representatives in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefcr; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to petitioners' Petition For A Writ of Certiorari are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 4/66 $150 wk. ($264 mo)

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? no

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? no

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. no

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Bruce Johnson
BRUCE JOHNSON

SUBSCRIBED AND SWORN
to before me this
15 day of February
1984.

NOTARY PUBLIC

My Commission Expires August 15, 1984